



Division of Enforcement

Memorandum

Subject: Enforcement Guidance Memorandum No. 2-2006 (Revision 1)
Civil Charges and Civil Penalties in Administrative Actions

To: Regional Directors, Division Directors

From: Michael G. Dowd, Director
Division of Enforcement

A handwritten signature in dark ink, appearing to read "Michael G. Dowd", is written over the printed name and title.

Date: June 29, 2007

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I. INTRODUCTION¹

A. STATUTORY BASIS AND FACTORS

Basic law in the Virginia Code gives authority to assess civil charges and civil penalties² in administrative actions, including:

- Civil charges in Consent Orders;
- Civil penalties in Va. Code § 10.1-1186 Special Orders; and
- Civil penalties of up to \$100,000 in certain Formal Hearing Orders.

This guidance sets out the specific criteria used by the Department of Environmental Quality ("Department") to calculate appropriate civil charges and civil penalties in administrative actions for the Air Program, the Waste Program, and the Water Quality and Water Resources Management Programs. This guidance does not address civil penalty calculations in judicial proceedings, nor does it address fines in criminal prosecutions. Mobile source charges and penalties are discussed in separate guidance.

¹ Disclaimer: Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures. See Va. Code [§ 2.2-4001](#). Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. This guidance supersedes Chapter Four of the December 1999 Department of Environmental Quality Enforcement Manual.

² Civil charges and civil penalties are not defined in the Virginia Code. The authorizing statute states whether the payment is called a civil charge or a civil penalty. In general, civil charges are assessed with the consent of the party, while civil penalties are assessed in adversarial actions.

The Virginia Code sets out five factors as the basis for calculating appropriate civil charges and civil penalties in most cases:³

- the severity of the violations;⁴
- the extent of any potential or actual environmental harm;
- the compliance history of the facility or person;
- any economic benefit realized from the noncompliance; and
- the ability of the person to pay the penalty.

These factors are applied throughout this guidance.

B. PURPOSE AND GENERAL CONSIDERATIONS

Civil charges and civil penalties support the Department's mission "to protect the environment of Virginia in order to promote the health and well-being of the Commonwealth's citizens."⁵ Assessing appropriate civil penalties and civil charges is also important to the Department's enforcement goals, which may be summarized as follows:

- To protect Virginia's environment and the health of its citizens by taking timely, appropriate, fair, consistent, and effective enforcement actions;
- To motivate the regulated community to adopt practices that achieve and maintain compliance with environmental requirements and advance protection of the environment;
- To bring facilities into compliance with applicable laws, regulations, orders, and permits;
- To stop repeated or ongoing violations and minimize the impacts of noncompliance;
- To require appropriate remedial measures;
- To deter future violations; and

³ [2005 Acts c. 706](#), amending Va. Code §§ [10.1-1316 \(D\)](#) (air), [10.1-1455 \(L\)](#) (waste), and [62.1-44.15 \(8e\)](#) (water). Separate statutory factors are set out for the Discharge of Oil into State Waters, Va. Code [§ 62.1-44.34:20 \(D\)](#) (Article 11 of the State Water Control Law).

⁴ This guidance uses the terms "violation" and "alleged violation" interchangeably. The Department follows the Administrative Process Act, Va. Code [§ 2.2-4000](#), *et seq.*, to determine whether a violation has occurred. The use of the term "violation" prior to a case decision by the Department should be construed to mean an alleged violation.

⁵ Va. Code [§ 10.1-1183](#). See [Va. Const Art. XI, § 1](#) ("[I]t shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth"). The cited Code section also lists twelve purposes of the Department including: "To promote environmental quality through ... expeditious and comprehensive permitting, inspection, monitoring and enforcement programs..."; and "To ensure that there is consistency in the enforcement of the laws, regulations and policies as they apply to holders of permits or certificates issued by the Department, whether the owners or operators of such regulated facilities are public sector or private sector entities."

- To ensure that economic advantage is not obtained through noncompliance and that a “level playing field” exists for the regulated community.⁶

The civil charge or civil penalty calculations contained in this guidance are constructed to remove any significant economic benefit of noncompliance, and include an amount reflecting the gravity of the violation (the “gravity component”). This approach is consistent with federal civil penalty considerations as well as the Virginia statutory factors cited above.

A civil charge or civil penalty is not appropriate in every case. Further, the Virginia Code grants immunity from civil charges and civil penalties for certain voluntarily disclosed violations.⁷ In other cases, in keeping with federal policy, the Department will exercise its enforcement discretion and mitigate most or all of the gravity portion of a charge or penalty, for violations that are discovered pursuant to a voluntary Environmental Assessment or an Environmental Management System (“EMS”) and that are voluntarily and promptly self-reported and corrected.⁸ Finally, the amount of a civil charge or civil penalty may be partially mitigated by a Supplemental Environmental Project (“SEP”).⁹ These are discussed in separate guidance.

Finally, the Department may depart from the recommended calculations contained in this guidance to seek penalties up to the maximum sums permitted by law where the interests of equity, deterrence, and justice so require. While unusual, it is appropriate in extreme cases of noncompliance, for example: where the violation or its potential or actual environmental harm are especially egregious and/or severe; where the violation has resulted in a declared emergency by federal, state, or local officials; where the violation has placed another person in imminent danger or death or serious bodily injury or harm; where the violation is contrary to the specific terms of an administrative order or judicial decree; where the violation or pattern of violations severely impacts an environmental media or resource, or prevents the Department from carrying out its duties; or where the violation is the result of a pattern or practice that demonstrates the willful avoidance of regulatory requirements. In these cases where the Department concludes that the severity of the violation or its potential or actual environmental harm justifies seeking up to the maximum penalties authorized by law, staff should apply the specific criteria described in this guidance as the qualitative basis in demonstrating how the applicable statutory factors substantiate the recalculation of the civil charge or civil penalty.

⁶The General Assembly indicated the importance of this element previously in [1997 Acts c. 924, paragraph L.4](#):

It is the intent of the General Assembly that the [Department] recover the economic benefit of noncompliance in the negotiation and assessment of civil charges and penalties in every case in which there is an economic benefit from noncompliance, and the economic benefit can be reasonably calculated.

⁷ Va. Code §§ [10.1-1199, -1233](#).

⁸ Voluntary disclosure and reporting do not include mandatory monitoring, sampling, or auditing procedures required by laws, regulations, permits, or enforcement actions.

⁹ Va. Code [§ 10.1-1186.2](#).

Ultimately, civil charges and civil penalties cannot exceed the statutory maximum, usually \$32,500 per day for each violation.¹⁰ Certain statutes set out other maximum civil charges or civil penalties, especially for portions of the Water Quality and Water Resources Management Programs.¹¹

The General Assembly has required the development of guidelines and procedures that contain “specific criteria for calculating the appropriate penalty for each violation” based on the five statutory factors. The specific criteria for calculating an appropriate civil charge or civil penalty are set out in this guidance and include: the potential for harm classifications, the categories of violations and various adjustments (including compliance history), the economic benefit of noncompliance, and the party’s ability to pay. Specific criteria are identified for the Air Program ([Section II](#)), the Waste Program ([Section III](#)), and the Water Quality and Water Resources Management Programs ([Section IV](#)). Each of the specific criteria identifies one or more of the five statutory factors that support it, as appropriate, in a footnote or on the related worksheet. The specific criteria for each program generally follow corresponding federal guidance.

In all compliance and enforcement actions, the paramount priorities of the Department are: to correct noncompliance promptly; to assure prompt implementation of all necessary remedial actions; to oversee appropriate process improvements; and to otherwise ensure protection of human health and the environment.

A Table of Contents follows. A list of acronyms is attached.

¹⁰ [2005 Acts c. 706](#). Before July 1, 2005, the typical maximum civil charge or civil penalty was \$25,000 per day per violation.

¹¹ See Sections IV I through IV K, below. Va. Code [§ 62.1-44.34:20](#) also establishes out minimum charges and penalties for certain violations involving the discharge of oil to state waters. Va. Code [§ 62.1-44.15 \(8f\)](#) establishes maximum civil charges for sanitary sewer overflows (“SSOs”) in consent orders requiring SSO corrective action. If this guidance does not specifically reference a statute authorizing a civil charge or civil penalty, such charge or penalty may be calculated using the five statutory factors.

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II. THE AIR PROGRAM

The State Air Pollution Control Law (“Air Law”) at [§ 10.1-1316 \(C\)](#) provides for negotiated civil charges in Consent Orders for violations of the Air Law, regulations, orders, or permit conditions. Sections II A through II E below describe calculation of negotiated civil charges. The maximum Air Program civil charge is \$32,500 for each violation, with each day being a separate violation.¹² Special considerations for pleading civil penalties in §10.1-1186 Proceedings or in Formal Hearings are discussed in Section [II F](#).

A. CONSENT ORDERS WITHOUT CIVIL CHARGES

Initially, staff establish whether the alleged violation warrants a civil charge. The following criteria should all be met for orders without civil charges:

- The severity of the violation is minimal. Consent Orders without civil charges are not typically available in “High Priority Violator (‘HPV’)” cases;
- The extent of the actual or potential environmental harm is negligible or minimal;
- The facility has not been in chronic noncompliance and is making a good-faith effort to comply; and
- The economic benefit of noncompliance is minimal.

The emphasis in all cases, but particularly in cases without civil charges or civil penalties, is on prompt and appropriate injunctive relief to bring facilities into compliance with applicable laws, regulations, orders, and permit conditions.¹³

B. CONSENT ORDERS WITH CIVIL CHARGES

Unless the alleged violation is so severe as to warrant an enhanced civil charge as described in the Introduction, the Department assesses civil charges in Consent Orders using the [Air Civil Charge/Civil Penalty Worksheet](#) (“Worksheet”), which is found at the end of the Air Program section. In calculating the appropriate civil charge, staff first identify the appropriate “Potential for Harm” classification and then work through the various categories on the Worksheet to calculate a Preliminary Subtotal. The Department may adjust the Preliminary Subtotal upwards or downwards to reach a Total Civil Charge/Civil Penalty on the Worksheet. The Worksheet Total Civil Charge/Civil Penalty may also be adjusted, for other appropriate and documented reasons, as demonstrated in

¹² For violations that occurred prior to July 1, 2005, the maximum civil charge is \$25,000 per violation per day.

¹³ No civil charge can be assessed if a statute grants the party immunity from civil charges. See Va. Code §§ [10.1-1199, -1233](#). Civil charges may be mitigated by voluntary reporting and correction or by a SEP, as described in the Introduction.

the Enforcement Recommendation and Plan (“ERP”) (*See* Section [II E](#)). The completed Worksheet should be presented to the party with the initial documents or draft order proposing or assessing a civil charge or civil penalty amount.¹⁴ The ERP adjustments are not set out on the Worksheet, but must be open to public view upon completion of the case.

C. POTENTIAL FOR HARM CLASSIFICATIONS¹⁵

Using best professional judgment, staff place violations into one of three “Potential for Harm” classifications - “Serious,” “Moderate,” or “Marginal” – that are listed near the top of the Worksheet. Staff classify the violations based on: (1) the potential for or actual human health or environmental harm; and (2) the effect on the regulatory program.

- **Human Health or Environmental Harm:** Human health or environmental harm considerations assume that the alleged violations that may cause excess emissions potentially adverse to human health or the environment.
- **Effect on the Regulatory Program:** This consideration examines whether the violation(s) or pattern of violations at issue are fundamental to the integrity of the regulatory program and the Department’s ability to monitor and protect human health and the environment.

The following sections define the three classifications and provide examples for each of the classification levels. The sections are not used to determine whether a violation warrants formal enforcement. Departures from the examples should be discussed with a representative of the Division of Enforcement (“DE”).

1. **Serious Classification**¹⁶

A violation is classified as Serious if: (1) the alleged violation has resulted in *documented, substantial adverse impact or presents a substantial risk* of adverse impact to human health, welfare, or the environment; (2) the limit, standard, or other requirement violated is *significant to the viability or enforceability of standards*, the violation of which may result in substantial adverse impact or present a substantial risk of adverse impact to human health, welfare, or the environment; and/or (3) the violations have or may have *substantial adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

¹⁴ For specific requirements regarding Formal Hearings, see Section II F, below.

¹⁵ This criterion relates to the statutory factors of environmental harm and severity.

¹⁶ This criterion relates to the statutory factors of environmental harm and severity.

Examples include, but are not limited to:

- Emissions violations at a major source involving a pollutant for which that source is “major” (applies to Prevention of Significant Deterioration (“PSD”), Maximum Available Control Technology (“MACT”), and Title V);
- Violations which cause a documented potential for exceedance of a National Ambient Air Quality Standard (“NAAQS”);
- Not maintaining control equipment or failure to use control equipment, for a regulated pollutant for which the source is major, in a manner consistent with good air pollution control practices. Also applicable to synthetic minor (“SM”) sources where there is evidence that the failure may have caused emissions to exceed the applicable SM threshold;
- Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is major;
- For a SM source, failure to comply with standards critical to maintenance of that minor status or failure to maintain records sufficient to document continued minor status (applies to PSD, MACT, and Title V);
- Failure to obtain a permit prior to construction or modification of a SM or state major source or a major modification under 9 Virginia Administrative Code (“VAC”) 5, Chapter 80, Article 6;
- Failure to obtain a permit prior to construction, reconstruction, or modification which triggers the requirements of 9 VAC 5-80-1700, *et seq.* or 9 VAC 5-80-2000, *et seq.*;
- Violation of a National Emission Standard for Hazardous Air Pollutants (“NESHAP”) or MACT standards that indicate excess emissions or substantially interfere with the Department’s ability to determine emissions compliance;
- Violation of substantive consent order, administrative order, or judicial decree requirements (typically not for late reports or minor record keeping deficiencies); and
- Failure to submit a timely Title V permit application (more than 60 days late), or to timely submit a compliance certification, excess emissions report, or other substantive report required by a Title V permit (more than 60 days late).

2. Moderate Classification¹⁷

A violation is classified as Moderate if: (1) the alleged violation presents *some risk of adverse impact* to human health, welfare, or the environment; (2) the limit, standard, or other requirement violated is *significant to the viability or enforceability of standards*, the violation of which may cause some risk of adverse impact to human health, welfare, or the environment; and/or (3) the violations which have or may have *some adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to:

- Emissions violations at a SM source that does not jeopardize the SM status of the source;
- Not maintaining control equipment or failure to use control equipment, for a pollutant, at a SM point source, in a manner consistent with good air pollution control practices (unless there is evidence that the failure resulted in emissions that jeopardize the synthetic minor status of the source);
- Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is a synthetic minor (unless there is additional evidence to indicate that the source is not in compliance with the limits that establish synthetic minor status for that pollutant);
- Failure to obtain a permit for a true minor source under 9 VAC 5, Chapter 80, Article 6; and
- Opacity violations at a source that is subject to the PSD, MACT, or Title V Programs.

3. Marginal Classification¹⁸

A violation is classified as Marginal if: (1) The violation presents *little or no risk of environmental impact*; and/or (2) the actions have or may have *little or no adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to:

- Emissions violations at a true minor source;

¹⁷ This criterion relates to the statutory factors of environmental harm and severity.

¹⁸ This criterion relates to the statutory factors of environmental harm and severity.

- Not maintaining control equipment or failure to use control equipment for a pollutant at a true minor source, in a manner consistent with good air pollution control practices, unless there is evidence that the failure resulted in emissions of a pollutant at a major source level;
- Failure to conduct emissions tests, monitor or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is a true minor source;
- Most record keeping and reporting violations including non-substantive violations at major, SM, and New Source Performance Standard (“NSPS”) sources (see Serious and Moderate categories for additional information on when violations at major or SM sources are not Marginal); and
- Opacity violations at a source that has been classified as either a True Minor or a SM.

D. CALCULATING THE WORKSHEET CIVIL CHARGE

The categories are the numbered items (Categories 1 through 11) that make up the rows of the Worksheet.

When using the Worksheet to address multiple violations discovered during the same compliance activity, staff calculate civil charges for each violation independently, with the exception of Category 8, and then combine them to provide the total proposed civil charge. Applicable portions of the Worksheet may be copied to accommodate multiple violations. Staff use this procedure to determine the appropriate civil charge for each category listed and enter it on the Worksheet.

1. Statutory, Regulatory, or Permit Violation Category¹⁹

This category is general in nature and is intended to establish a minimum civil charge for all violations of statutory, regulatory, or permit requirements. This charge is in addition to any which may apply under Category 4 of the Worksheet for the same violation. If the source is being assessed for violation of a PSD, NESHAP, MACT, or substantive NSPS requirement, the applicable charges in Category 1 are doubled.

- a. Failure to Obtain Required Permit:²⁰** This civil charge applies to construction/modification/reconstruction without a new source permit and to the failure to obtain an operating permit.

¹⁹ This criterion relates to the statutory factors of severity and environmental harm.

²⁰ This criterion relates to the statutory factors of severity and environmental harm.

- b. Operating Without a Permit:**²¹ This civil charge applies to construction/modification/reconstruction without a new source permit where the source has begun operation of the source affected by the permit applicability determination. This civil charge is assessed in addition to Subcategory 1.a.
- c. Statute/Regulation/Permit Violated (other than a. or b., above):**²² This civil charge applies to violations of permit conditions and requirements of the Air Law or Regulations that are not already addressed by Subcategory 1.a or 1.b.

2. Order Violation Category²³

In Category 2, the Department assesses civil charges for consent or other order violations. This charge is in addition to any civil charges calculated in Categories 1, 3, or 4 of the Worksheet.

3. Pollution Control Equipment Violation Category²⁴

In Category 3, the Department assesses civil charges for the failure to install or properly operate and maintain air pollution control equipment. Category 3 civil charges are not limited to traditional end-of-the-pipe equipment. Category 3 also applies to monitoring equipment and to production equipment where that equipment has been identified as Best Available Control Technology (“BACT”) or Reasonable Available Control Technology (“RACT”) or Lowest Achievable Emission Rate (“LAER”), or as a pollution control device or method in a permit.

- a. Failure to Install Required Equipment:**²⁵ This civil charge applies, but is not limited, to:
 - Failure to install air pollution control equipment specifically required by permit, order, or regulation, or removal of such equipment;
 - Failure to install equipment necessary to meet BACT, RACT, LAER, Best Achievable Retrofit Technology (“BART”), or similar mandatory control technology requirements (in situations of construction/modification/reconstruction without a permit) as may be determined through the permit review process; or

²¹ This criterion relates to the statutory factors of severity and environmental harm.

²² This criterion relates to the statutory factors of severity and environmental harm.

²³ This criterion relates to the statutory factors of severity, environmental harm, and compliance history.

²⁴ This criterion relates to the statutory factors of severity and environmental harm.

²⁵ This criterion relates to the statutory factors of environmental harm and severity.

- Failure to install pollution control equipment capable of meeting emissions limits established by permit, order, or regulations where installation of control equipment is required by a permit, regulation, consent or administrative order, consent decree, or court order.

b. Failure to Properly Operate and Maintain Equipment:²⁶ This civil charge applies where the source does not to operate the equipment properly or is not operating or maintaining the equipment adequately. Staff should carefully consider the appropriateness of assessing a Category 3 charge if a charge is also being assessed under Category 4 of the Worksheet. A situation could exist where the pollution controls are maintained and operated properly but, nonetheless, an emission violation still occurs. In that situation, it is not appropriate to assess a civil charge for improperly operated pollution control equipment (Category 3). If emissions violation occurred even though pollution controls were maintained and operated properly, select a charge for the emissions violation under Category 4 instead.

4. Emissions, Reporting/Monitoring, and Toxics Violations Category²⁷

a. Emissions Violations:²⁸ In Category 4, the Department assesses a charge for documented violations of emissions standards, which may be in addition to charges applied in Subcategory 1.c, 2, or 3. A Category 4 emissions charge applies to any emission exceedance of a standard established by state or federal statutes, regulations, permits, or orders (including opacity).

To calculate the appropriate charge for an emissions violation, staff enter the emissions limit or standard and the observed value in the Data column of the Worksheet. Then staff calculate the “% over limit” and insert the percentage in the Data column. The appropriate value in each of the three “Potential for Harm” columns is taken from Table 1 and entered in Category 4.a of the Worksheet. Staff select the charge from the appropriate Potential for Harm column and transfer to the Amount column of the Worksheet.

For example, assume a source has permitted limit of a 422 tons per year for volatile organic compounds (“VOCs”), calculated as a consecutive 12 month period. Records demonstrate that the facility had actual emissions of 519 tons of VOCs for a 12-month rolling period.

²⁶ This criterion relates to the statutory factors of environmental harm and severity.

²⁷ This criterion relates to the statutory factors of severity and environmental harm.

²⁸ This criterion relates to the statutory factors of environmental harm and severity.

Assume the violation is classified as “Serious.” The charge for the emissions violation is calculated as follows:

- Subtract the permitted limit of 422 tons from the observed VOC emissions of 519 tons. Divide the difference by the permit limit of 422 and multiply by 100 to obtain the “% over limit,” in this case, 23%.

$$((519-422)/422) \times 100 = 23\%$$

- Locate the amount for the “% over Limit or Standard” in Table 1. If the value is not in Table 1, the penalty for a Serious violation can be calculated by multiplying the percent over by \$100.

$$23\% \times \$100 = \$2,300$$

- In this example, the Amount entered in Category 4.a. of the Worksheet would be \$2,300.

As another example, assume a minor source has a permitted limit of 50 tons per year for VOCs, calculated as a consecutive 12-month period. Records demonstrate that the facility had actual emissions of 75 tons of VOCs for a 12-month rolling period. Assume the violation is classified as “Marginal.” The charge for the emissions violation is calculated as follows:

- Subtract the permitted limit of 50 tons from the observed VOC emissions of 75 tons. Divide the difference by the permitted limit of 50 and multiply by 100 to obtain the “% over limit,” in this case, 50%.

- $((75-50)/50) \times 100 = 50\%$

- Locate the amount for the “% over Limit or Standard Table 1, below, and calculate if necessary. Select the civil charge values under the Marginal column for 50% (\$1,250).

- In this example, the Amount entered in Category 4.a. of the Worksheet is \$1,250.

Table 1
EMISSION LIMIT VIOLATIONS
MONETARY CIVIL CHARGE MATRIX

% over Limit or Standard	Emissions		
	POTENTIAL FOR HARM		
	Serious (\$100 x % over)	Moderate (\$50 x % over)	Marginal (\$25 x % over)
10	\$1,000	\$500	\$250
20	2,000	1,000	500
30	3,000	1,500	750
40	4,000	2,000	1,000
50	5,000	2,500	1,250
60	6,000	3,000	1,500
70	7,000	3,500	1,750
80	8,000	4,000	2,000
90	9,000	4,500	2,250
100	10,000	5,000	2,500
200	20,000	10,000	5,000
>/=300, etc.	30,000	15,000	7,500

- b. Reporting/Monitoring Violations:**²⁹ Situations assessed under this category include other types of compliance assurance reporting/monitoring. Violations include, but are not limited to:
- **Late Submittal of Reports:** Add \$650 to the base amount on Worksheet. Ten days are allotted to the source to submit the report after the Notice of Violation (“NOV”). Another \$250 per day is charged for every day after the ten-day period. The civil charge under this category is calculated on an emissions unit basis, *e.g.*, if

²⁹ This criterion relates to the statutory factors of severity and environmental harm.

the source must submit a quarterly report for three emissions units and two were late, the civil charge would be \$1,300 with \$500 added each day after the ten-day period. This civil charge is assessed commencing with the second consecutive late submittal of a required periodic compliance assurance report (*e.g.*, Excess Emissions Report, Monitoring System Performance Report, Data Assessment Report, Fuel Certification Report, Emissions Report, *etc.*). Reporting requirements include those found in the applicable statute, regulation, order, and/or permit.

- ***Failure to Perform Required Audits:*** Add \$1,950 to base amount in Worksheet. After the issuance of a NOV, two weeks is allotted to the source to perform the audit, without an additional penalty being assessed. An additional \$250 per day is charged for every day past the two week period. The civil charge under this category is calculated on a per monitoring system, *e.g.*, if the source must conduct a quarterly audit on three individual monitoring systems (excluding redundant back-up systems) and two were late, the civil charge would be \$3,900 with \$500 added each day after the ten-day period.
- ***Excessive Monitoring Downtime:*** Add \$2,600 to base amount on the Worksheet for each monitoring system that does not meet the required monitor availability.

- c. **Toxic Pollutant Violations:**³⁰ This civil charge is assessed to emissions and monitoring violations involving a toxic pollutant. A toxic pollutant is defined in the regulations as “any air pollutant listed in § 112(b) of the federal Clean Air Act, as revised by 40 [Code of Federal Regulations (“CFR”)] 63.60, or any other air pollutant that the board determines, through adoption of regulation, to present a significant risk to public health. This term excludes asbestos, fine mineral fibers, radionuclides, and any glycol ether that does not have a TLV.” Staff are reminded that, for “existing sources,” the regulations establish significant ambient air concentration “guidelines” for toxic pollutants. If the existing source is found to be in excess of a guideline, the regulations provide specific alternatives to address the exceedance. Therefore, an existing source is not considered to be a toxic pollutant violator until or unless the Department has notified it of the exceedance and the source has failed to respond as specified in 9 VAC 5-60-200. Where a violation involves exceedance of a permit limit for a toxic pollutant, a charge should be assessed for both the emission violation and the toxic pollutant.

³⁰ This criterion relates to the statutory factors of environmental harm and severity.

5. Sensitivity of the Environment Category³¹

Category 5 focuses on the geographic location of the violation. Civil charges associated with this category are dependent on the nonattainment/attainment status or the PSD area classification and the classification of the violation. The sensitivity of the environment charge applies only to emission standards violations or to work practice or technology standards that serve as emission standards, or to violations of monitoring requirements. When a violation occurs in a nonattainment area, the nonattainment charge applies only for violations involving pollutants or pollutant precursors for which the area is designated nonattainment. The regulations contain a description of the nonattainment areas and the PSD classifications.

6. Length of Time Factor Category³²

The longer a violation continues uncorrected, the greater the potential for harm to air quality and the more severe the violation. The Worksheet addresses this consideration in the category labeled “Length of Time Factor.” Where separate charges are not assessed for daily, documented violations, the Department calculates the charge for this factor as follows:

- Multiply the number of days the violation occurred by 0.274 (*i.e.*, 1/365). This is the Percent (%) Increase Factor.
- Divide this Factor by 100 to obtain the decimal expression, which is then multiplied by the Preliminary Subtotal to obtain the additional civil charge.

The time span (expressed in days) used to calculate the charge begins, based on available evidence, on the day the violation began. The time span ends on the date the source corrects the deficiency addressed by the civil charge or the date the source agrees in principle to a set of corrective actions designed to achieve compliance with the regulatory requirement for which the charge was assessed. For construction without a permit, the time span ends when the source submits a complete permit application for the affected process or equipment. For alleged violations where the length of time exceeds five years, as determined by this section, the Department calculates the charge based on a length of time of five years (1826 days). This limitation on length of time is not applicable to calculation of economic benefit.

³¹ This criterion relates to the statutory factor of environmental harm.

³² This criterion relates to the statutory factors of severity, environmental harm and compliance history.

The following is an example of how to calculate a “length of time” civil charge:

- Calculate the length of time in days that the noncompliance existed. For example, 200 days elapsed between the beginning day of the noncompliance and the date the source agreed in principle to a set of corrective actions necessary to return to a state of compliance.
- Multiply the number of days by 0.274. Take 200 and multiply it by 0.274 to get 54.8, which is rounded up to the nearest whole number to get 55%, or a factor of 0.55.
- Multiply the Preliminary Subtotal calculated on the Worksheet by the Length of Time Factor. Assume for this example that the Preliminary Subtotal is \$1,300. \$1,300 times 0.55 yields \$715.
- Enter the calculated charge into the “Amount” column for Category 6 on the Worksheet.

7. Compliance History Category³³

Staff considers prior enforcement activities of the Air Law, regulations, orders, and permits in adjusting the civil charge based on the source’s compliance history. Prior enforcement activities include any act or omission resulting in an “enforcement response,” *e.g.*, a Warning Letter, NOV, or other enforcement document. The Department does not consider Warning Letters and NOVs that it did not pursue (*e.g.*, enforcement matters that were closed without the issuance of a letter of agreement, consent or administrative order, consent decree, or court order).

This factor may be used to increase – but not decrease – a charge. Evidence of an excellent compliance history cannot be used in this category to justify reducing a civil charge on a current and unrelated violation.

Table 2
COMPLIANCE HISTORY (previous 36 months)

Number of Violations	Charge Factor
Second Violation	.50
Third Violation	1.00
Over Third Violation	(N–3) + 1.00

³³ This criterion relates to the statutory factor of compliance history.

In this example, staff use Table 2 and take the following steps to calculate a compliance history charge:

- Review the sources compliance history to determine if any additional violations were noted during the previous 36 months. For example, assume the source had a previous NOV issued 14 months prior to the currently pending enforcement action (do not include additional violations which were discovered as part of the same inspection).
- Look up on the above table and determine the appropriate factor to adjust the civil charge. The current enforcement action represents the second violation in 36 months so the Charge Factor is 0.50 (or 50%).
- Multiply the Preliminary Subtotal of the civil charge calculated on the Worksheet by the Charge Factor. From the example above the base charge is \$1,300. Multiplying \$1,300 by 0.5 yields \$650.
- Write the calculated charge into the “Amount” column for Category 7 “Compliance History” on the Worksheet.

8. Extended Compliance Category³⁴

Category 8 addresses a source’s request to extend any date in a schedule by which it is required to come into compliance. The extended compliance civil charge applies where the proposed schedule is based upon limitations such as a reasonable construction or equipment delivery schedule. Compliance delays proposed for monetary considerations or for the sake of convenience (*e.g.*, to coordinate equipment installation with the routine annual maintenance shutdown) should only be accepted if the source demonstrates that the associated financial burden is beyond their “ability to pay.”

The Department factors in an “extended compliance” civil charge where the source proposes a schedule that will extend a compliance date. Consequently, for a Consent Order that includes a compliance schedule, the Department increases the Preliminary Subtotal according to length of the extended compliance. In doing so, staff calculate the length of the extension, in months, and multiply the number by 2.78, which results in the percent increase due to the extended compliance. For compliance schedules of less than one month (30 days), staff are not required to calculate an extended compliance charge. The Department assesses partial months (as determined on 30-day increments) as a full month when calculating the extended compliance charge. The Consent Order should include a schedule detailing important interim dates and the final date by which compliance will be achieved.

³⁴ This criterion relates to the statutory factors of severity, environmental harm, and ability to pay.

Federal regulations list specific procedures for processing “Delayed Compliance Orders.” EPA maintains the authority to disapprove any Department-approved Delayed Compliance Order, subject to the public participation guidelines described in CFR. Regional staff should forward all proposed Delayed Compliance Orders to DE for review prior to entering into a Consent Order with that source.

The following is an example of how to calculate an “extended compliance” civil charge:

- Calculate the length of time, in months (on a 30-day basis), compliance will be extended by execution of the order. For example, the schedule in the consent order indicates a six-month (180-day) delay before compliance will be achieved.
- Multiply the number of months by 2.78. Take 6 and multiply it by 2.78 to get 16.68. Round this up to whole numbers to get 17%, or a factor of 0.17.
- Multiply the Preliminary Subtotal of the civil charge calculated on the Worksheet by the Extended Compliance Factor. Continuing with this example, the Preliminary Subtotal is \$1,300. \$1,300 times 0.17 yields \$221.
- Write the calculated charge into the “Amount” column for Category 8 on the Worksheet.

9. Degree of Culpability Category³⁵

Category 9 addresses the degree of culpability of the source in committing the violation. A low degree of culpability indicates that the violation occurred despite the source’s discernable diligence in ascertaining and following program requirements. A medium degree of culpability indicates that the violation is the result of the source’s failure to exercise reasonable care in adhering to program requirements appropriate to the particular circumstances. A high degree of culpability indicates that the violation was in reckless disregard of program requirements or was the result of a deliberate act.³⁶ A graduated culpability factor is associated with the degree of culpability. An upward adjustment is not appropriate in all cases. For purposes of this category, violations of Consent Orders or other orders are presumed to be the result of a medium or high degree of culpability.

³⁵ This criterion relates to the statutory factors of severity and compliance history.

³⁶ Evidence of a deliberate act may be grounds for a referral to criminal investigative authorities.

To calculate the adjustment using the culpability factor staff:

- Based on a review of the facts surrounding the violation, determine the degree of culpability associated with the source's actions.
- Multiply the Preliminary Subtotal of the civil charge calculated on the Worksheet by the appropriate Culpability Factor (0 for low, 0.5 for medium, and 1.0 for high).
- Write the calculated charge into the "Amount" column for Category 9 on the Worksheet.

10. Economic Benefit of Noncompliance³⁷

Category 10 addresses the economic benefit component of the civil charge. This factor is included in a civil charge to ensure the charge acts as a deterrent to noncompliance. At a minimum, a civil charge or civil penalty should remove any significant economic benefit of noncompliance in addition to a "gravity component." By developing a civil charge assessment structure that incorporates this deterrent effect, an enforcement action removes any economic gain that a source or facility accrues by avoiding or delaying costs necessary to achieve compliance, or from illegal competitive advantage ("ICA").³⁸ The existence of a significant economic benefit gained from noncompliance is evaluated on a case-by-case basis. Staff use professional judgment when making the preliminary determination that an economic benefit exists. When there is evidence of an economic benefit based on delayed or avoided costs, or ICA, staff should estimate the value of the economic benefit and include this amount in the proposed civil charge.

EPA's BEN model is a method for calculating economic benefit from delayed and avoided expenditures. If the economic benefit exceeds \$10,000, BEN should be used to calculate benefit. BEN uses several data variables, most of which contain default values. The required variables include information about capital and non-capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. BEN allows a cooperative facility to provide actual financial data that may affect the civil charge calculation. For economic benefit calculations of less than \$10,000 or where the facility will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including their best professional judgment.³⁹ Finally,

³⁷ This criterion relates to the statutory factor of economic benefit. *See* Clean Air Act § 113(e)

³⁸ Illegal competitive advantage occurs when the party's noncompliant actions allow it to attain a level of revenues that would not have been obtainable otherwise, *e.g.*, selling a product using water resources in excess of permitted amounts, or draining/filling and selling wetlands without appropriate permits.

³⁹ Staff may use the following "rule-of-thumb" in exercising their judgment: for delayed compliance, 6% per year of the delayed on-time capital costs for the period from the date the violation began until the date compliance was or is expected to be achieved; for avoided costs, the expenses avoided until the date compliance is achieved.

methods other than BEN may be used to calculate economic benefit of noncompliance, where the Department concludes that an alternative method provides more meaningful results.

A necessary first step when making a preliminary determination of economic benefit is understanding the costs avoided or delayed through noncompliance. A delayed cost is an expenditure that, through current noncompliance, can be put off to sometime in the future. An avoided cost is an expenditure not made, resulting in noncompliance.

- Examples of delayed costs include, but are not limited to: failure to install equipment needed to meet emission control standards; failure to effect process changes needed to reduce pollution; failure to test where the test still must be performed; and failure to install required monitoring equipment.
- Examples of avoided costs include, but are not limited to: disconnecting or failing to properly operate and maintain existing pollution control equipment; failure to employ a sufficient number of staff; failure to adequately train staff; failure to establish or follow precautionary methods required by regulations or permits; removal of pollution equipment resulting in process, operational, or maintenance savings; disconnecting or failing to properly operate and maintain required monitoring equipment; and operation and maintenance of equipment that the party failed to install.

The intent is to recoup the economic benefit of noncompliance in all cases. There are four general areas where settling the total civil charge amount for less than the economic benefit may be appropriate. The four exceptions are:

- The economic benefit component has *de minimis* value to the overall settlement;
- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that the Department will be able to recover the economic benefit in litigation; and
- The facility has successfully documented an inability to pay the total proposed civil charge.

11. Ability of the Person to Pay the Civil Charge⁴⁰

Ability to pay is one of the five statutory factors. In general, the Department will reduce penalty assessments that are clearly beyond the means of the party. At the same time, it is important that the regulated community not perceive the violation of environmental requirements as cost savings for financially-troubled businesses, and the Department will, in appropriate circumstances, continue to seek penalties where a business has failed to allocate environmental compliance costs in their business operations. It is also unlikely that the Department would reduce a penalty where a facility refuses to correct a serious violation, or where a party has a long history of previous violations, or where the violations of the law are particularly egregious.

The burden to demonstrate inability to pay rests on the regulated party, as it does with any mitigating circumstance. A party's inability to pay usually will reduce a civil charge only if the regulated party provides sufficient information to justify the adjustment, through the use of the EPA computer models ABEL, INDIPAY, or MUNIPAY.

If a facility is unable to pay the calculated civil charge or would be prevented from carrying out essential remedial measures by doing so, the Department should consider the following options with the facility in the order presented:

- Installment payment plan with appropriate interest;
- Delayed payment schedule with appropriate interest; and
- Reduction, up to the full amount of the civil charge, including economic benefit, based on ability to pay modeling.

Regardless of the Department's determination of an appropriate penalty amount to pursue based on ability-to-pay considerations, the party is always expected to comply with the applicable law, regulations, orders, and permit conditions.

E. ADJUSTMENTS IN THE ENFORCEMENT RECOMMENDATION AND PLAN⁴¹

The Department may adjust a civil charge downward in the ERP at several points in its calculation: (1) staff may adjust the gravity component of the civil charge before economic benefit is added; and (2) staff may also reduce the total civil charge for specific litigation and strategic considerations.

⁴⁰ This criterion relates to the statutory factor of ability to pay.

⁴¹ This criterion relates to all of the statutory factors.

For all adjustments, staff should clearly document the adjustment calculation and its reasons for the adjustment either in the ERP itself, or on the [Civil Charge/Civil Penalty Adjustment Form](#), which is attached to the ERP. A revised ERP and/or Adjustment Form may be required, depending on when the Department makes the adjustments. The appropriate level of management should approve all adjustments. Decisions regarding adjustment are not subject to administrative appeal or judicial review.

1. Charge Adjustments Before Considering Economic Benefit⁴²

The Department may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors where there are clearly documented, case-specific facts that support the adjustment as provided in this section. This adjustment is not appropriate in all cases. Staff may consider the following factors: cooperativeness/quick settlement; and promptness of injunctive response/good faith effort to comply; and statutory judicial considerations.

The gravity component may be reduced by more than 30% if appropriate circumstances exist. Staff should document the basis for reducing a charge beyond 30% on the Civil Charge/Civil Penalty Adjustment Form. Regional staff should consult with the DE when considering an adjustment beyond 30%. DE staff evaluate the adjustment for appropriateness and consistency.

- **Cooperativeness/Quick Settlement:** The Department may adjust a charge where a facility is cooperative in resolving the case in a timely and appropriate manner and it makes a good faith effort to settle the violations quickly.
- **Promptness of Injunctive Response/Good Faith Effort to Comply:** Good faith efforts to comply with regulatory requirements or permit conditions include prompt reporting of noncompliance, prompt initiation of corrective action, prompt correction of environmental problems, and cooperation during the investigation. Owners who agree to expedited corrective action schedules may also qualify. Staff should consider institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of funding procedures.
- **Statutory Judicial Considerations:** Va. Code § [10.1-1316 B](#) requires courts, in assessing judicial civil penalties, to consider “in addition to such other factors as [they] may deem appropriate, the size of the owner's business, the severity of the economic impact of the penalty on the

⁴² This criterion relates to the statutory factors of compliance history, severity, environmental harm, and ability to pay.

business, and the seriousness of the violation.” Although not directly applicable to administrative actions, these considerations may be used to determine whether a downward adjustment is appropriate in the ERP, and if so, the amount of the adjustment.

2. **Litigation and Strategic Considerations**⁴³

The Department may also adjust a civil charge downward – including the economic benefit of noncompliance - for specific litigation and strategic considerations. Adjustments for litigation and strategic considerations should be carefully considered and documented. Before reducing a charge for litigation or strategic considerations, regional staff should discuss the proposed reduction with DE. Staff may reduce the Total Civil Charge based on documented strategic considerations, including:

- **Problems of Proof:** Problems with proving the case may be due to inadequate information, conflicting evidence, or contributory activity by the Department. In many cases problems of proof are considered as part of the Litigation Potential, but may also be considered independently.
- **Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment:** The impact or threat of impact is a factor used in conjunction with other strategic considerations. It could provide additional justification for a reduction if there is a lack of impact, or reason to reject a reduction if impacts are consequential. The evaluation should include a broad assessment of environmental impact and not be limited to just the media where the violation occurred.
- **The Precedential Value of the Case:** Resolution of certain cases may establish a valued endorsement of an agency program or regulatory or enforcement initiative. A reduction to the proposed civil charge may be appropriate to obtain such a precedent.
- **Probability of Meaningful Recovery of a Civil Charge:** In certain cases, information available to the Department indicates that recovery of a meaningful civil charge is not possible. Recognizing that a portion of the civil charge is intended to serve as deterrence, this factor may be appropriate for use with local governments and publicly funded service authorities. Also, in situations where the entity primarily responsible for the violation can not be held accountable, it may not be appropriate to assess the full civil charge against those left responsible for correction.
- **Litigation Potential.** Through negotiations it may become apparent that the case is destined for litigation based solely on factors not relevant to environmental protection.

⁴³ This criterion relates to all of the statutory factors.

It may also be appropriate, in the ERP or Adjustment Form, to include authority to increase a civil charge or civil penalty for continuing or uncorrected violations, previously undiscovered violations, or for economic benefits from continuing delays in compliance, to provide additional incentives to resolve the action expeditiously.

F. CIVIL PENALTIES IN § 10.1-1186 PROCEEDINGS AND FORMAL HEARINGS

When an appropriate civil charge cannot be agreed upon with the consent of the party, the Department may elect to use an adversarial administrative process. Civil penalties are available following §10.1-1186 Proceedings⁴⁴ and following certain Formal Hearings.⁴⁵ In these actions, the penalty is pled and argued rather than established by consent. By statute, penalties are limited to a maximum of \$10,000 in a §10.1-1186 Proceeding and, following a Formal Hearing, \$32,500 for each violation, not to exceed \$100,000 per order.

DE is generally the lead in adversarial administrative processes. Staff should use the Worksheet and specific criteria in Sections II B through II E⁴⁶ to determine the amount to be sought in a Formal Hearing, but in preparing the documents, staff should resolve any reasonable issues or questions in favor of the Department. In Formal Hearings, staff should seek the highest penalty justified by all of the facts, up to \$100,000 per order. The calculation is not limited to the amount that may have been offered in attempting to reach a settlement. Any adjustment for “cooperativeness” or for “promptness of injunctive response/good faith effort to comply” should be omitted in seeking a civil penalty in a Formal Hearing. By statute, the person must be provided with the calculation for the proposed penalty prior to any Formal Hearing conducted for an order that assesses penalties.⁴⁷ If the case is settled while the proceeding is still pending, the penalty can be modified and calculated as any civil charge, described above. Any adjustment should be documented in a revised Worksheet or the ERP. The development of a penalty amount to be pled in a judicial complaint is not covered in this guidance.⁴⁸

⁴⁴ See Va. Code Va. Code [§ 10.1-1186 \(10\)](#) (special orders); [§ 10.1-1182](#) (special order defined, with limit of \$10,000 and duration of not more than 12 months); and Va. Code [§ 2.2-4019](#) (informal fact finding proceedings under the Administrative Process Act). The informal fact-finding can be before the Director of the Department or his designee; however, the Director may not delegate his authority to impose civil penalties in such proceedings.

⁴⁵ See Va. Code [§ 10.1-1309 \(A\) \(vi\)](#) and [§ 2.2-4020](#) (formal hearings; litigated issues under the Administrative Process Act). For Formal Hearings with civil penalties, the hearing must be before an officer appointed by the Virginia Supreme Court.

⁴⁶ The statutory factors are those noted in the referenced sections.

⁴⁷ [2005 Acts. c. 706](#); [Va. Code § 10.1-1309 \(A\) \(vi\)](#).

⁴⁸ Authority for civil penalties in judicial proceedings may be found at Va. Code [§§ 10.1-1311, -1316 \(B\)](#).

AIR CIVIL CHARGE/CIVIL PENALTY WORKSHEET							
Va. Code §§ 10.1-1316 , -1309							
Source/Responsible Party	Reg.#					NOV Date	
	Data	Potential for Harm			Amount		
		Serious	Moderate	Marginal			
1. Statutory/Regulatory/Permit Violation							
a. Failure to obtain required permit.	Y	N	\$ 7,800	\$ 2,600	\$ 1,300		
b. Operating without a permit	Y	N	\$ 5,200	\$ 2,600	\$ 1,300		
c. Statute/regulation/permit violated (<i>other than a or b above</i>) (<i>Multiply by 2 if violation is PSD/NESHAP/ MACT/substantive NSPS.</i>)	Y	N	\$ 2,600	\$ 1,300	\$ 650		
	Y	N					
2. Order Violation							
a. Consent or Other Order condition violated.	Y	N	\$ 5,200	\$ 2,600	\$ 1,300		
3. Pollution Control Equipment Violation							
a. Failure to install required equipment.	Y	N	\$ 13,000	\$ 7,800	\$ 2,600		
b. Failure to properly operate or maintain equipment.	Y	N	\$ 13,000	\$ 7,800	\$ 2,600		
4. Emissions, Monitoring, and Toxics Violations							
a. Violation of Emission Limit or Standard (% over limit or standard)			\$100 (x) % over	\$50 (x) % over	\$25 (x) % over		
- Limit or Standard							
- Observed Value							
b. Reporting/Monitoring Violation							
(1) Late submittal of reports (per emissions unit)	Y	N	\$650 + \$250/day after 10 days				
(2) Failure to perform required audits (per monitoring system)	Y	N	\$1,950 + \$250/day after 14 days				
(3) Excessive monitoring downtime (per month per monitoring system)	Y	N	\$2,600 per monitoring system				
c. Toxics Violation	Y	N	\$ 2,600	\$ 1,300	\$ 800		
5. Sensitivity of the Environment							
a. Nonattainment Area	Y	N	\$ 5,200	\$ 2,600	\$ 1,300		
b. Class I PSD area	Y	N	\$ 2,600	\$ 1,300	\$ 800		
c. Class II and III PSD area	Y	N	\$ 1,300	\$ 500	\$ 300		
Preliminary Civil Charge/Civil Penalty Subtotal							
	Data	Factor					
6. Length of Time Factor (<i>enter days</i>)		%					
7. Compliance History (<i>enter # within last 36 months</i>)		%					
8. Extended Compliance (<i>enter months</i>)		%					
9. Degree of Culpability (<i>applied to Preliminary Civil Charge/Civil Penalty Subtotal</i>)			Low = 0	Medium = (x) 0.5	High = (x) 1.0		
10. Economic Benefit							
11. Ability to Pay (<i>based on information supplied by the source/party</i>)						()	
Total Civil Charge/Civil Penalty (<i>may not exceed \$32,500 per day per violation for violations on and after July 1, 2005, and \$25,000 per day per violation for previous violations</i>)						\$	

Comments:

III. THE WASTE PROGRAM

The Virginia Waste Management Act at Va. Code [§ 10.1-1455 \(F\)](#) provides for including negotiated civil charges in a Consent Order for past violations of the Act, any regulation or order of the Board or Director, or any permit condition. Sections III A through E below describe calculation of negotiated civil charges. The maximum Waste Program civil charge is \$32,500 for each violation, with each day being a separate violation.⁴⁹ Special considerations for pleading civil penalties in § 10.1-1186 Proceedings or Formal Hearings are discussed in Section [III F](#), below.

A. CONSENT ORDERS WITHOUT CIVIL CHARGES

Initially, staff establish whether the alleged violation warrants a civil charge. The following criteria should all be met for orders without civil charges:

- The severity of the violation is minimal. Consent Orders without civil charges are not typically available in hazardous waste “Significant Non-Complier” (“SNC”) cases;
- The extent of the actual or potential environmental harm is negligible or minimal;
- The facility has not been in chronic noncompliance and is making a good-faith effort to comply; and
- The economic benefit of noncompliance is minimal.

The emphasis in all cases, but particularly in cases without civil charges or civil penalties, is on prompt and appropriate injunctive relief to bring facilities into compliance with applicable laws, regulations, orders, and permit conditions.⁵⁰

B. CONSENT ORDERS WITH CIVIL CHARGES

Unless the alleged violation is so severe as to warrant an enhanced civil charge as described in the Introduction, the Department calculates civil charges for all waste programs using the [Waste Civil Charge/Civil Penalty Worksheet](#) (“Worksheet”), which is found at the end of the Waste Program section. In calculating a civil charge, staff first identify the appropriate “Potential for Harm” classification and then work through the various categories on the Worksheet to calculate a Total Civil Charge/Civil Penalty. The Worksheet Total Civil Charge/Civil Penalty may also be adjusted, for other appropriate and documented reasons, as demonstrated in the Enforcement Recommendation and Plan

⁴⁹ For violations that occurred prior to July 1, 2005, the maximum civil charge is \$25,000 per violation per day.

⁵⁰ No civil charge can be assessed if a statute grants the party immunity from civil charges. See Va. Code §§ [10.1-1199](#), [-1233](#). Civil charges may be mitigated by voluntary reporting and correction or by a SEP, as described in the Introduction.

(“ERP”) (*See* Section [III E](#)). The completed Worksheet should be presented to the party with the initial documents or draft order proposing or assessing a civil charge or civil penalty amount.⁵¹ The ERP adjustments are not set out on the Worksheet, but must be open to public view upon completion of the case.

C. **POTENTIAL FOR HARM CLASSIFICATIONS**⁵²

Using best professional judgment, staff place violations into one of three “Potential for Harm” classifications - “Serious,” “Moderate,” or “Marginal” – that are listed near the top of each Worksheet. Staff classify the violations based on: (1) the extent of risk of exposure to humans or the environment; and/or (2) the effect on the regulatory program.

Risk of Exposure

The risk of exposure involves both the probability of exposure and the potential consequences that may result from exposure. In considering the risk of exposure, emphasis is placed on the potential for harm posed by a violation as well as on whether harm actually occurred. The facility may have no control over the presence or absence of direct harm. Such facilities should not be rewarded with lower civil charges simply because the violations did not result in actual harm.

Where a violation involves the actual management of waste, a civil charge should reflect the probability that the violation could have or has resulted in a release of waste or waste constituents or could have or has resulted in a threat of exposure to waste or waste constituents. Staff determine the likelihood of a release based on whether the integrity and/or stability of the waste management unit is likely to have been compromised. Some factors to consider in making this determination are: evidence of release (*e.g.*, existing soil or groundwater contamination); evidence of waste mismanagement (*e.g.*, rusting drums); and adequacy of provisions for detecting and preventing a release (*e.g.*, monitoring equipment and inspection procedures). A larger civil charge is presumptively appropriate where the violation significantly impairs the ability of the waste management system to prevent and/or detect releases of waste and constituents.

In calculating risk of exposure, staff weigh the harm that would result if the waste or constituents were in fact released to the environment. Some factors to consider in making this determination are: quantity and toxicity of wastes (potentially) released; likelihood or fact of transport by way of environmental media (*e.g.*, air and groundwater); and existence, size, and proximity of receptor populations (*e.g.*, local residents, fish, and wildlife, including threatened or endangered species); and sensitive environmental media (*e.g.*, surface waters and aquifers).

⁵¹ For specific requirements regarding Formal Hearings, see Section III F, below.

⁵² This criterion relates to the statutory factors of environmental harm and severity.

Effect on the Regulatory Program

There are some requirements of the Waste Program that, if violated, may not appear to give rise directly or immediately to a significant risk of contamination; nevertheless, the regulatory requirements work together to assure protection of human health and the environment. Examples of regulatory harm include, but are not limited to:

- Failure to notify as a generator or transporter of hazardous waste and/or owner of a hazardous waste facility;
- Failure to comply with financial assurance requirements;
- Failure to submit a timely/adequate solid waste Part B application;
- Failure to respond to an authorized information request;
- Operating without a permit;
- Failure to prepare or maintain a hazardous waste manifest;
- Failure to install or conduct adequate groundwater monitoring; and
- Certain failures to comply with record keeping that undermine the Department's ability to determine compliance.

The following sections define the three potential for harm classifications (Serious, Moderate, and Marginal) and provide examples for each of the classification levels. The sections provide examples of violations for each classification only and are not used to determine whether a violation warrants formal enforcement. Departures from the examples should be discussed with a representative of the Division of Enforcement ("DE").

1. Serious Classification⁵³

A violation is classified as serious if: (1) the violation has caused actual exposure or presents a *substantial risk* of exposure to humans or the environment, and/or (2) the actions have or may have a *substantial adverse effect* on the statutory or regulatory purposes or procedures for implementing the program.

As an example in hazardous waste, 9 VAC 20-60-265, incorporating 40 CFR § 265.143, requires that owners or operators of hazardous waste facilities establish financial assurance to ensure that funds will be available for proper closure of facilities. Under 9 VAC 20-60-265, incorporating 40 CFR § 265.143(a)(2), the wording of a trust agreement establishing financial assurance for closure must be identical to the wording specified in the incorporated 40 CFR § 264.151(a)(1). Even a slight alteration of the language could change the legal effect of the financial instrument so that it would no longer satisfy the intent of

⁵³ This criterion relates to the statutory factors of environmental harm and severity.

the regulation. When the language of the agreement differs from the requirement such that funds would not be available to close the facility properly, the lack of identical wording would have a substantial adverse effect on the regulatory scheme (and, to the extent the closure process is adversely affected, could pose a substantial risk of exposure). This violation would therefore be assigned to the serious potential for harm classification.

As an example in solid waste, under 9 VAC 20-80-113, solid waste management facilities are required to implement a control program for unauthorized waste. If a facility failed to implement such a program, or implemented a program deficiently, so that unauthorized wastes, such as polychlorinated biphenyls ("PCBs"), may go undetected, these violations would be assigned a serious potential for harm classification.

2. Moderate Classification⁵⁴

A violation is classified moderate if: (1) the violation presents or may present a *significant risk* of exposure to humans or the environment, and/or (2) the actions have or may have a *significant adverse effect* on the statutory or regulatory purposes or procedures for implementing the program.

As an example in hazardous waste, owners and operators of hazardous waste facilities that store containers must comply with the regulations found at 9 VAC 20-60-264, incorporating 40 CFR Part 264, Subpart I. One of the regulations found in this subpart requires owners/operators to inspect, at least weekly, container storage areas to ensure containers are not deteriorating or leaking (incorporated 40 CFR § 264.174). If a facility was inspecting storage areas twice monthly, this situation could present a significant risk of release of hazardous wastes to the environment. Because some inspections were occurring, it is unlikely that a leak would go completely undetected; however, the frequency of the inspections may allow a container to leak for up to two weeks unnoticed. The moderate potential for harm classification would be appropriate in this case.

As an example, in solid waste, 9 VAC 20-80-250 (E) (4) specifies the time allowed for closure of a solid waste management unit. If the time allowed were exceeded by a modest number of days and there was no evidence of other adverse environmental effects from the delay, the moderate potential for harm classification would be appropriate in this case.

⁵⁴ This criterion relates to the statutory factors of environmental harm and severity.

3. Marginal Classification⁵⁵

A violation is classified as marginal if: (1) the violation presents or may present a *relatively low risk* of exposure to humans or the environment, and/or (2) the actions have or may have a *small adverse effect* on the statutory or regulatory purposes or procedures for implementing the program.

As an example in hazardous waste, owners or operators of hazardous waste facilities must, under 9 VAC 20-60-262, incorporating 40 CFR § 262.23, sign each manifest certification by hand. If a facility was using manifests that had a type-written name where the signature should be, but the manifests were otherwise completed correctly and had other indicia that the information was correct, the likelihood of exposure and adverse effect on the implementation of the program may be relatively low. The marginal potential for harm classification could be appropriate for such a situation.

As an example in solid waste, under 9 VAC 20-80-250 (C) (13), litter and blowing paper shall be confined to refuse holding and operating areas by fencing or other suitable control means. If litter or blowing paper were observed elsewhere on the landfill and the problem was not chronic or continuing, the marginal potential for harm classification would be appropriate.

D. CALCULATING THE WORKSHEET CIVIL CHARGE

The categories are the numbered items (Categories 1 through 6) that make up the rows of the Worksheet. A separate Worksheet is completed for each alleged violation; however, staff may consolidate multiple violations that arise out of a single act or omission into a single violation for purposes of calculating civil charges. Staff use the following procedures to determine the appropriate civil charge for each category listed on the Worksheet.

1. Extent of Deviation from Requirement Category⁵⁶

The "extent of deviation" from Waste Program requirements relates to the degree to which the alleged violation departs from the requirement. In determining the extent of the deviation, the following categories should be used:

- MAJOR: Deviations from requirements of the statute, regulation, order, or permit to such an extent that most (or important aspects) of the requirements are not met, resulting in substantial noncompliance.

⁵⁵ This criterion relates to the statutory factors of environmental harm and severity.

⁵⁶ This criterion relates to the statutory factors of severity and environmental harm.

- **MODERATE:** Discernable deviations from the requirements of the statute, regulation, order, or permit, but some of the requirements are implemented as intended.
- **MINOR:** Deviations to a lesser extent from the statute, regulation, order, or permit, but most (or all important aspects) of the requirements are met.

A few examples help demonstrate how a given violation is to be placed in the proper category:

As one example, 9 VAC 20-60-265, incorporating 40 CFR § 265.112, requires that owners or operators of treatment, storage, and disposal facilities have a written closure plan. This plan must identify the steps necessary to completely or partially close the facility at any point during its intended operating life. Possible violations of the requirements of this regulation range from having no closure plan at all to having a plan which is minimally inadequate (*e.g.*, it omits one minor step in the procedures for cleaning and decontaminating the equipment while complying with the other requirements). Such violations should be assigned to the "major" and "minor" categories, respectively. A violation between these extremes might involve failure to modify a plan for increased decontamination activities as a result of a spill on-site and would be assigned to the moderate category.

As another example, 9 VAC 20-60-265, incorporating 40 CFR § 265.14, requires that owners or operators of treatment, storage, and disposal facilities take reasonable care to keep unauthorized persons from entering the active portion of a facility where injury could occur. Generally, a physical barrier must be installed and any access routes controlled. The range of potential noncompliance with the security requirements is broad. Total noncompliance with regulatory requirements such as this would result in classification into the major category. In contrast, the violation may consist of a small oversight such as failing to lock an access route on a single occasion. With all other factors being equal, the less significant noncompliance should draw a smaller penalty assessment. In the matrix system this is achieved by choosing the minor category.

To determine the charge for a violation or consolidated violations, staff select the proper charge from the Worksheet corresponding to the Potential for Harm and the Extent of Deviation for the violation(s), and enter this number in the "Amount" column of the Worksheet.

2. Multi-Day Component Category⁵⁷

A multi-day factor for continuing violations may be applied by multiplying the number of days of continuing violations by the factor in the appropriate Worksheet column based on the Potential for Harm classification and the Extent of

⁵⁷ This criterion relates to the statutory factors of severity, environmental harm, and compliance history.

Deviation designation. Where separate charges are not assessed for daily, documented violations, the Department uses the Multi-Day Component Category for days 2 through 180 for continuing violations in appropriate cases. This factor is generally applied when there is solid evidence to support continuing, discrete violations over an extended period. For example, a multi-day component would normally be applied in cases where multiple, continuing releases occurred under the same circumstances. The multi-day factor would not routinely be used for violations not related to discrete, continuing violations (*e.g.*, operating without a permit). Use of a multi-day component is presumed for days 2 through 180 of all violations that cause a facility to be designated as SNC.

Upon determining that a multi-day factor is appropriate, staff would then select the proper charge from the Worksheet, depending on the Potential for Harm and the Extent of Deviation. Staff then multiply the appropriate multi-day factor by the number of days of continuing violations, and enter the subtotal in the “Amount” column of the Worksheet.

The multi-day component may be applied beyond 180 days in appropriate or egregious situations.

3. Degree of Culpability Category⁵⁸

Category 3 addresses the degree of culpability of the facility in committing the violation. A low degree of culpability indicates that the violation occurred despite the facility’s discernable diligence in ascertaining and following program requirements. A medium degree of culpability indicates that the violation is the result of the facility’s failure to exercise reasonable care in adhering to program requirements appropriate to the particular circumstances. A high degree of culpability indicates that the violation was in reckless disregard of program requirements or was the result of a deliberate act.⁵⁹ A graduated culpability factor is associated with the degree of culpability. An upward adjustment is not appropriate in all cases. For purposes of this category, violations of Consent Orders or other orders are presumed to be the result of a medium or high degree of culpability.

To calculate the adjustment using the culpability factor staff:

- Based on a review of the facts surrounding the violation, determine the degree of culpability associated with the source’s actions.
- Multiply the sum of the “Extent of Deviation” and “Multi-Day” components of the civil charge calculated on the Worksheet by the appropriate Culpability Factor (0 for low, 0.5 for medium, and 1.0 for high).

⁵⁸ This criterion relates to the statutory factors of severity and compliance history.

⁵⁹ Evidence of a deliberate act may be grounds for a referral to criminal investigative authorities.

- Write the calculated charge into the “Amount” column for Category 3 on the Worksheet.

4. Compliance History Category⁶⁰

Staff use the Compliance History Category to increase the civil charge for repeat violations of the same or substantially related requirements within the previous 36 months of the violation. Staff use the Potential for Harm classification and the Extent of Deviation designation to select the appropriate cell on the Worksheet for this category and enter this charge into the “Amount” column for Category 4 of the Worksheet.

5. Economic Benefit of Noncompliance⁶¹

Category 5 addresses the economic benefit component of the civil charge. This factor is included in a civil charge to ensure the charge acts as a deterrent to noncompliance. At a minimum, a civil charge or civil penalty should remove any significant economic benefit of noncompliance in addition to a “gravity component.” By developing a civil charge assessment structure that incorporates this deterrent effect, an enforcement action removes any economic gain that a source or facility accrues by avoiding or delaying costs necessary to achieve compliance, or from illegal competitive advantage (“ICA”).⁶² The existence of a significant economic benefit gained from noncompliance is evaluated on a case-by-case basis. Staff use professional judgment when making the preliminary determination that an economic benefit exists. When there is evidence of an economic benefit based on delayed or avoided costs, or ICA, staff should estimate the value of the economic benefit and include this amount in the proposed civil charge.

EPA’s BEN model is a method for calculating economic benefit from delayed and avoided expenditures. If the economic benefit exceeds \$10,000, BEN should be used to calculate benefit. BEN uses several data variables, most of which contain default values. The required variables include information about capital and non-capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. BEN allows a cooperative facility to provide actual financial data that may affect the civil charge calculation. For economic benefit calculations of less than \$10,000 or where the facility will not or cannot provide financial data in a timely manner, staff may make estimates based

⁶⁰ This criterion relates to the statutory factor of compliance history.

⁶¹ This criterion relates to the statutory factor of economic benefit.

⁶² Illegal competitive advantage occurs when the party’s noncompliant actions allow it to attain a level of revenues that would not have been obtainable otherwise, *e.g.*, selling a product using water resources in excess of permitted amounts, or draining/filling and selling wetlands without appropriate permits.

on available resources, including their best professional judgment.⁶³ Finally, methods other than BEN may be used to calculate economic benefit of noncompliance, where the Department concludes that an alternative method provides more meaningful results.

A necessary first step when making a preliminary determination of an economic benefit is understanding the costs avoided or delayed through noncompliance. A delayed cost is an expenditure that, through current noncompliance, can be put off to sometime in the future. An avoided cost is an expenditure that will not be made due to noncompliance. Examples of avoided costs include, but are not limited to:

- Sampling and analytical costs for groundwater and gas monitoring; and
- Annual expenses associated with hazardous waste recordkeeping and personnel training;

Examples of delayed costs include, but are not limited to:

- Capital equipment improvement or repairs (including engineering design, purchase, installation, and replacement); and
- One-time acquisitions (such as equipment or real estate purchases).

The intent is to recoup the economic benefit of noncompliance in all cases. There are four general areas, however, where settling the total civil charge amount for less than the economic benefit may be appropriate. The four exceptions are:

- The economic benefit component has *de minimis* value to the overall settlement;
- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that the Department will be able to recover the economic benefit in litigation; and
- The facility has successfully documented an inability to pay the total proposed civil charge.

6. Ability of the Person to Pay a Civil Charge⁶⁴

Ability to pay is one of the five statutory factors. In general, the Department will reduce penalty assessments that are clearly beyond the means of the party. At the same time, it is important that the regulated community not

⁶³ Staff may use the following “rule-of-thumb” in exercising their judgment: for delayed compliance, 6% per year of the delayed on-time capital costs for the period from the date the violation began until the date compliance was or is expected to be achieved; for avoided costs, the expenses avoided until the date compliance is achieved.

⁶⁴ This criterion relates to the statutory factor of ability to pay.

perceive the violation of environmental requirements as cost savings for financially-troubled businesses, and the Department will, in appropriate circumstances, continue to seek penalties where a business has failed to allocate environmental compliance costs in their business operations. It is also unlikely that the Department would reduce a penalty where a facility refuses to correct a serious violation, or where a party has a long history of previous violations, or where the violations of the law are particularly egregious.

The burden to demonstrate inability to pay rests on the regulated party, as it does with any mitigating circumstance. A party's inability to pay usually will reduce a civil charge only if the regulated party provides sufficient information to justify the adjustment, through the use of the EPA computer models ABEL, INDIPAY, or MUNIPAY.

If a facility is unable to pay the calculated civil charge or would be prevented from carrying out essential remedial measures by doing so, the Department should consider the following options with the facility in the order presented:

- Installment payment plan with appropriate interest;
- Delayed payment schedule with appropriate interest; and
- Reduction, up to the full amount of the civil charge, including economic benefit, based on ability to pay modeling.

Regardless of the Department's determination of an appropriate penalty amount to pursue based on ability-to-pay considerations, the party is always expected to comply with the applicable law, regulations, orders, and permit conditions.

E. ADJUSTMENTS IN THE ENFORCEMENT RECOMMENDATION AND PLAN⁶⁵

The Department may adjust a civil charge downward in the ERP at several points in its calculation: (1) staff may adjust the gravity component of the civil charge before economic benefit is added; and (2) staff may also reduce the total civil charge for specific litigation and strategic considerations.

For all adjustments, staff should clearly document the adjustment calculation and its reasons for the adjustment either in the ERP itself, or on the [Civil Charge/Civil Penalty Adjustment Form](#), which is attached to the ERP. A revised ERP and/or Adjustment Form may be required, depending on when the Department makes the adjustments. The appropriate level of management should approve all adjustments. Decisions regarding adjustment are not subject to administrative appeal or judicial review.

⁶⁵ This criterion relates to all of the statutory factors.

1. Charge Adjustments Before Considering Economic Benefit⁶⁶

The Department may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors where there are clearly documented, case-specific facts that support the adjustment as provided in this section. This adjustment is not appropriate in all cases. Staff may consider the following factors: cooperativeness/quick settlement; promptness of injunctive response/good faith effort to comply; and size and sophistication of the violator.

The gravity component may be reduced by more than 30% if appropriate circumstances exist. Staff should document the basis for reducing a charge beyond 30% on the Civil Charge/Civil Penalty Adjustment Form. Regional staff should consult with DE when considering an adjustment beyond 30%. DE staff evaluate the adjustment for appropriateness and consistency.

- **Cooperativeness/Quick Settlement:** The Department may adjust a charge where a facility is cooperative in resolving the case in a timely and appropriate manner and it makes a good faith effort to settle the violations quickly.
- **Promptness of Injunctive Response/Good Faith Effort to Comply:** Good faith efforts to comply with regulatory requirements or permit conditions include prompt reporting of noncompliance, prompt initiation of corrective action, prompt correction of environmental problems, and cooperation during the investigation. Owners who agree to expedited corrective action schedules may also qualify. Staff should consider institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of funding procedures.
- **Size and Sophistication of the Violator:** In adjusting the civil charge/civil penalty amount, enforcement staff may consider the size and sophistication of the violator. When considering the sophistication of the violator, enforcement staff may presume, in the absence of information to the contrary, that entities such as small non-profit organizations and small municipalities do not possess the same level of sophistication as other regulated entities. The sophistication of the violator is also relevant in the case of a small business.

⁶⁶ This criterion relates to the statutory factors of compliance history, severity, environmental harm, and ability to pay.

2. **Litigation and Strategic Considerations**⁶⁷

The Department may also adjust a civil charge downward – including the economic benefit of noncompliance - for specific litigation and strategic considerations. Adjustments for litigation and strategic considerations should be carefully considered and documented. Before reducing a charge for litigation or strategic considerations, regional staff should discuss the proposed reduction with DE. Staff may reduce the Total Civil Charge based on documented strategic considerations, including:

- **Problems of Proof:** Problems with proving the case may be due to inadequate information, conflicting evidence, or contributory activity by the Department. In many cases problems of proof are considered as part of the Litigation Potential, but may also be considered independently.
- **Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment:** The impact or threat of impact is a factor used in conjunction with other strategic considerations. It could provide additional justification for a reduction if there is a lack of impact, or reason to reject a reduction if impacts are consequential. The evaluation should include a broad assessment of environmental impact and not be limited to just the media where the violation occurred.
- **The Precedential Value of the Case:** Resolution of certain cases may establish a valued endorsement of an agency program or regulatory or enforcement initiative. A reduction to the proposed civil charge may be appropriate to obtain such a precedent.
- **Probability of Meaningful Recovery of a Civil Charge:** In certain cases, information available to the Department indicates that recovery of a meaningful civil charge is not possible. Recognizing that a portion of the civil charge is intended to serve as deterrence, this factor may be appropriate for use with local governments and publicly funded service authorities. Also, in situations where the entity primarily responsible for the violation can not be held accountable, it may not be appropriate to assess the full civil charge against those left responsible for correction..
- **Litigation Potential:** Through negotiations it may become apparent that the case is destined for litigation based solely on factors not relevant to environmental protection.

It may also be appropriate, in the ERP or Adjustment Form, to include authority to increase a civil charge or civil penalty for continuing or uncorrected violations, previously undiscovered violations, or for economic benefits from continuing delays in compliance, to provide additional incentives to resolve the action expeditiously.

⁶⁷ This criterion relates to all of the statutory factors.

F. CIVIL PENALTIES IN § 10.1-1186 PROCEEDINGS AND FORMAL HEARINGS

When an appropriate civil charge cannot be agreed upon with the consent of the party, the Department may elect to use an adversarial administrative process. Civil penalties are available following §10.1-1186 Proceedings⁶⁸ and following certain Formal Hearings.⁶⁹ In these actions, the penalty is pled and argued rather than established by consent. By statute, penalties are limited to a maximum of \$10,000 in a §10.1-1186 Proceeding and, following a Formal Hearing, \$32,500 for each violation, not to exceed \$100,000 per order.

DE is generally the lead in adversarial administrative processes. Staff should use the Worksheet and specific criteria in Sections III B through III E⁷⁰ to determine the amount to be sought in a Formal Hearing, but in preparing the documents, staff should resolve any reasonable issues or questions in favor of the Department. In Formal Hearings, staff should seek the highest penalty justified by all of the facts, up to \$100,000 per order. The calculation is not limited to the amount that may have been offered in attempting to reach a settlement. Any adjustment for “cooperativeness” or for “promptness of injunctive response/good faith effort to comply” should be omitted in seeking a civil penalty in a Formal Hearing. By statute, the person must be provided with the calculation for the proposed penalty prior to any Formal Hearing conducted for an order that assesses penalties.⁷¹ If the case is settled while the proceeding is still pending, the penalty can be modified and calculated as any civil charge, described above. Any adjustment should be documented in a revised Worksheet or the ERP. The development of a penalty amount to be pled in a judicial complaint is not covered in this guidance.⁷²

⁶⁸ See Va. Code [§ 10.1-1186 \(10\)](#) (special orders); [§ 10.1-1182](#) (special order defined, with limit of \$10,000 and duration of not more than 12 months); and Va. Code [§ 2.2-4019](#) (informal fact finding proceedings under the Administrative Process Act). The informal fact-finding can be before the Director of the Department or his designee; however, the Director may not delegate his authority to impose civil penalties in such proceedings.

⁶⁹ See Va. Code [§ 10.1-1455 \(G\)](#) and [§ 2.2-4020](#) (formal hearings; litigated issues under the Administrative Process Act). For Formal Hearings with civil penalties, the hearing must be before an officer appointed by the Virginia Supreme Court.

⁷⁰ The statutory factors are those noted in the referenced sections.

⁷¹ [2005 Acts. c. 706](#); [Va. Code § 10.1-1455 \(G\)](#).

⁷² Authority for civil penalties in judicial proceedings may be found at Va. Code [§§ 10.1-1418.1, -1455 \(A\) and \(E\)](#).

WASTE CIVIL CHARGE/CIVIL PENALTY WORKSHEET						
<u>Va. Code § 10.1-1455</u>						
Permittee/Responsible Party	Permit/ID No.			NOV Date		
	Potential For Harm					
Violation No. _____	Data	Serious	Moderate	Marginal	Amount	
1. Extent of Deviation from Requirement						
a. Major	Y	N	\$ 26,000	\$ 9,000	\$ 2,600	
b. Moderate	Y	N	\$ 13,000	\$ 6,000	\$ 1,300	
c. Minor	Y	N	\$ 8,000	\$ 3,500	\$ 300	
d. Subtotal						
2. Multi-Day Component (<i>n = number of days of continuing violation</i>)						
a. Does the multi-day component apply? If no, go to #3.	Y	N				
b. Major	Y	N	\$1,300 (x) n =	\$700 (x) n =	\$200 (x) n =	
c. Moderate	Y	N	\$1,000 (x) n =	\$400 (x) n =	\$150 (x) n =	
d. Minor	Y	N	\$700 (x) n =	\$200 (x) n =	\$100 (x) n =	
e. Multi-day subtotal						
3. Degree of Culpability						
a. Is there substantial evidence of culpability? (<i>applied to sum of 1.d. and 2.e.</i>)	Y	N	Low = 0	Medium = (x) 0.5	High = (x) 1.0	
b. Culpability subtotal						
4. Compliance History (within past 36 months)						
a. Major	Y	N	\$ 6,500	\$ 5,500	\$ 2,000	
b. Moderate	Y	N	\$ 5,900	\$ 3,300	\$ 1,300	
c. Minor	Y	N	\$ 4,000	\$ 2,600	\$ 300	
d. Compliance history subtotal						
Cumulative Subtotal (<i>lines 1d+2e+3b+4d</i>)						
5. Economic Benefit of Noncompliance						
6. Ability to Pay (<i>based on information supplied by the owner/operator</i>)						()
Total Civil Charge/Civil Penalty (<i>may not exceed \$32,500 per day per violation for violations on and after July 1, 2005, and \$25,000 per day per violation for previous violations</i>)						\$

Comments:

IV. THE WATER QUALITY AND WATER RESOURCES MANAGEMENT PROGRAMS

The procedures in Section IV are used to calculate civil charges and civil penalties for the Water Quality and Water Resources Management Programs.⁷³

The State Water Control Law (“Water Law”) at Va. Code § [62.1-44.15 \(8d\)](#) provides for the payment of civil charges in Consent Orders for past violations of the Water Law, regulations, orders, and permit conditions. This statutory section is the basis for negotiated civil charges in most Water Programs, including the Virginia Pollutant Discharge Elimination System (“VPDES”) Program, the Virginia Pollution Abatement (“VPA”) Permit Program, and the Industrial Storm Water Program. Sections IV A through IV E below describe calculations of negotiated civil charges. With the exception of consent orders to prevent or minimize sanitary sewer overflows (“SSOs”),⁷⁴ the maximum civil charge is \$32,500 for each violation, with each day being a separate violation.⁷⁵ Special considerations for pleading civil penalties in §10.1-1186 Proceedings or in Formal Hearings are discussed in [Section IV F](#).

The same section of the Virginia Code (Va. Code § [62.1-44.15 \(8d\)](#)), is also the basis for negotiated civil charges for the Virginia Water Protection Permit (“VWPP”) Program⁷⁶ and the Regulated Underground Storage Tank Program (Article 9 of the Water Law).⁷⁷ Separate criteria and Worksheets are set out for these programs in [Section IV G](#) and [Section IV H](#), below.

In addition, there are separate authorities for negotiated civil charges and civil penalties, and different penalty limits, for Water Quality and Water Resources Management violations regarding:

- the discharge of oil into state waters and Aboveground Storage Tanks (“ASTs”) (Article 11 of the Water Law) (Va. Code § [62.1-44.34:20 \(C\) and \(D\)](#));
- ground water management areas (Va. Code § [62.1-270 \(A\)](#));
- surface water management areas (Va. Code § [62.1-252 \(B\)](#));
- animal feeding operations (“AFOs”) (Va. Code § [62.1-44.17:1 \(J\)](#)); and
- poultry waste management (Va. Code § [62.1-44.17:1.1 \(F\)](#)).

Criteria and worksheets are set out for these programs in Sections IV I through K, below.

⁷³ As used in Section IV of this guidance, “Water Programs” include both the Water Quality Program and the Water Resources Management Program, to the extent the context requires.

⁷⁴ Va. Code § [62.1-44.15 \(8f\)](#) establishes maximum civil charges for SSO violations in consent orders requiring SSO corrective action. Maximum civil charges for SSO violations in such consent orders are \$11,000 per violation, with a maximum civil charge limit of \$157,500. These limits correspond to those found in 33 U.S.C. § 1319 (g), as modified by the Debt Collection Improvement Act of 1996, Pub. L. 104-134. See [40 CFR § 19.4, Table 1 \(2006\)](#).

⁷⁵ For violations that occurred prior to July 1, 2005, the maximum civil charge is \$25,000 per violation per day. The maximum amounts for consent civil charges are incorporated by reference from Va. Code § [62.1-44.32 \(a\)](#).

⁷⁶ Va. Code § [62.1-44.15:5](#)

⁷⁷ Va. Code §§ [62.1-44.34:8](#) and [-44.34:9](#)

A. CONSENT ORDERS WITHOUT CIVIL CHARGES

Initially, staff establish whether the alleged violation warrants a civil charge. The following basic criteria should all be met for all cases without civil charges:

- The severity of the violation is minimal;
- The extent of the actual or potential environmental harm is negligible or minimal;
- The facility has not been in chronic noncompliance and is making a good-faith effort to comply; and
- The economic benefit of noncompliance is minimal.

The emphasis in all cases, but particularly in cases without civil charges or civil penalties, is on prompt and appropriate injunctive relief to bring facilities into compliance with applicable laws, regulations, orders, and permit conditions.⁷⁸

Assuming the basic criteria are met, the following types of cases may qualify as ones where a civil charge is not appropriate. This list is illustrative and not intended to be exhaustive.

- Municipal VPDES (major or minor) upgrade or expansion or collection system correction delayed due to the inability to secure funding;
- Where interim limits are needed pending connection to a municipal wastewater treatment system or a larger regional wastewater treatment system;
- Minor VPDES permittees, such as trailer courts operating lagoons or other antiquated systems, which will eventually shut down or be connected to a municipal sewer system; and
- Violations resulting from unavoidable or unforeseeable events, of short duration, with little or no environmental impact, but not including violations of reporting requirements.

B. CONSENT ORDERS WITH CIVIL CHARGES

Unless the alleged violation is so severe as to warrant an enhanced civil charge as described in the Introduction, the Department calculates civil charges for violations of most Water Programs using the [Water Civil Charge/Civil Penalty Worksheet](#) (“Worksheet”), which is found following Section IV F of this guidance.

Civil charges are generally appropriate in Consent Orders when one or more of the following criteria are met (the list is not exhaustive):

⁷⁸ No civil charge can be assessed if a statute grants the party immunity from civil charges. See Va. Code §§ [10.1-1199](#), [-1233](#). Civil charges may be mitigated by voluntary reporting and correction or by a SEP, as described in the Introduction.

- Failure to respond to technical assistance efforts;
- Violation of enforcement orders without mitigating circumstances;
- Violations that are avoidable;
- Noncompliance that is continuing or likely to recur;
- Knowing violations;⁷⁹ or
- Violations resulting in environmental damage.

In calculating the appropriate civil charge, staff first identify the appropriate “Potential for Harm” classification and then work through the various categories on the appropriate Worksheet to calculate a Total Civil Charge/Civil Penalty. The Worksheet Total Civil Charge/Civil Penalty may also be adjusted, for other appropriate and documented reasons, as demonstrated in the Enforcement Recommendation and Plan (“ERP”) (See [Section IV E](#)). The completed Worksheet should be presented to the party with the initial documents or draft order proposing or assessing a civil charge or civil penalty amount.⁸⁰ The ERP adjustments are not set out on the Worksheet, but must be open to public view upon completion of the case.

C. POTENTIAL FOR HARM CLASSIFICATIONS⁸¹

Using best professional judgment, staff place each violation into one of three “Potential for Harm” classifications – “Serious,” “Moderate,” or “Marginal” – that are listed near the top of each Worksheet. Staff classify the violation base on: (1) potential for or actual human health or environmental impact; and (2) effect on the regulatory program. The “effect on the regulatory program” consideration examines whether the violation(s) or pattern of violations at issue are of requirements fundamental to the continued integrity of the regulatory program and may undermine the statutory or regulatory purposes or procedures for implementing the regulatory program.

The following sections define the three classifications and provide examples for each of the levels. The sections provide examples of violations for each classification only and are not used to determine whether a violation warrants formal enforcement. Departures from the examples should be discussed with a representative of the Division of Enforcement (“DE”).

⁷⁹ Evidence of a deliberate act may be grounds for referral to criminal investigative authorities.

⁸⁰ For specific requirements regarding Formal Hearings, see Section IV F, below.

⁸¹ This criterion relates to the statutory factors of environmental harm and severity.

1. **Serious Classification**⁸²

A violation is classified as Serious if: (1) the violation has impacted or presents an *imminent and substantial risk* of impacting human health and/or the environment such that serious damage has resulted or is likely to result; and/or (2) the actions have or may have a *substantial adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to: fish kills; effluent violations resulting in loss of beneficial uses; failure to report an unpermitted discharge; chronic refusal to apply for a permit or perform a Toxics Management Plan (“TMP”); unpermitted impacts to large amounts or critically important surface waters or wetlands (including most impacts covered under a VWPP individual permit); impacts exceeding surface water or wetlands permits (includes impacts > 5 acres or 200 linear feet stream channel); failure to complete on-site or off-site creation or restoration of wetlands; impacts that are deliberate, irreversible, or difficult to restore; and withdrawal of surface waters in excess of permit limits that results in imminent risk of impacting instream uses.

2. **Moderate Classification**⁸³

A violation is classified as Moderate if: (1) the violation presents or may present *some risk* of impacting the environment, but those impacts would be moderate and correctable in a reasonable period of time; and/or (2) the actions have or may have a *noticeable adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to: unpermitted discharges resulting in identifiable sedimentation into surface waters or wetlands that can readily be restored; failure to observe Best Management Practices (“BMPs”) in VWPP permits; chronic late submission of monitoring reports or permit application materials; impacts exceeding surface water or wetlands permits (includes impacts > ¼ acre wetlands or > 50 linear feet stream channel, and most VWPP general permit conditions); failure to complete purchase of bank credits, contribution to in-lieu fund, recordation, *etc.*; and withdrawal of surface waters in excess of permit limits that may have some risk of impacting the environment.

⁸² This criterion relates to the statutory factors of environmental harm and severity.

⁸³ This criterion relates to the statutory factors of environmental harm and severity.

3. **Marginal Classification**⁸⁴

A violation is classified as Marginal if: (1) the violation presents *little or no risk* of environmental impact; and/or (2) the actions have or may have a *little or no adverse effect* on statutory or regulatory purposes or procedures for implementing the regulatory program.

Examples include, but are not limited to: an improperly completed Discharge Monitoring Report (“DMR”) that does not result in a Serious or Moderate classification; minor exceedances (*i.e.*, less than or equal to 10% of the allowable limit) in land application with no impact to ground or surface water; and minor wetlands or surface water instream violations.

D. **CALCULATING THE WORKSHEET CIVIL CHARGE**

1. **Gravity Based Component**⁸⁵

Staff identify all of the violations being addressed in the gravity-based component section of the Worksheet and calculate the charge separately for each violation. The gravity-based component covers two areas: (a) violations and frequency; and (b) aggravating factors as multipliers. Staff categorize the charges in the first area (violations and frequency) based on their Potential for Harm classification.

The noncompliance period considered should generally be limited to six months prior to the date of referral. Charges generally should not exceed \$50,000 per month of noncompliance. Under the gravity-based component staff mark “Y” or “N” for each violation that applies and determine the civil charge per violation based on the number of occurrences and the Potential for Harm classification. The charge is then entered into the “Amount” column of the Worksheet.

a. Violations and Frequency:⁸⁶ The violations generally fall into one of the following categories and the frequency is the frequency per month, unless otherwise noted:

- (1) Effluent Limits (per parameter per month, or longer, specified interval)
- (2) Operational Deficiencies
- (3) Monitoring/Submissions

⁸⁴ This criterion relates to the statutory factors of environmental harm and severity.

⁸⁵ This criterion relates to the statutory factors of severity and environmental harm.

⁸⁶ This criterion relates to the statutory factors of severity and environmental harm.

- (4) Bypasses/Overflows (applies to high flow/wet weather conditions where operations and maintenance (“O&M”) is otherwise in compliance) (per day or per event)
- (5) Spills/Unpermitted discharges (per day or per event)
- (6) Compliance/Construction/Payment Schedules
- (7) No Permit
- (8) Failure to Report (per event per month)
- (9) BMPs and/or erosion and sediment (“E&S”) controls not installed or maintained (storm water)
- (10) Failure to record inspections (storm water)
- (11) No storm water pollution prevention plan (“SWPPP”) (storm water)
- (12) Incomplete SWPPP or SWPPP not on site (per event) (storm water)
- (13) Other

Staff should mark “Y” or “N” for each type of violation and apply the appropriate multiplier in the Worksheet, depending on the number of occurrences and whether the violation is Serious, Moderate, or Marginal. The charge is then entered into the “Amount” column of the Worksheet.

- b. Aggravating Factors as Multipliers:** After calculating charges for each violation category, staff add the charges to arrive at a subtotal. Aggravating factors are then considered and added as appropriate. Aggravating factors are:

- **Major Facility:**⁸⁷ If a VPDES facility is classified as "major" using EPA criteria, this factor applies.
- **Compliance History - Administrative/Judicial Order Violation:**⁸⁸ If the violation, which is the subject of the enforcement action, is a violation of a prior administrative or court order, this factor applies.
- **Degree of Culpability:**⁸⁹

This category addresses the degree of culpability of the facility in committing the violation. A low degree of culpability indicates that the violation occurred despite the facility’s discernable

⁸⁷ This criterion relates to the statutory factor of severity and environmental harm.

⁸⁸ This criterion relates to the statutory factor of compliance history.

⁸⁹ This criterion relates to the statutory factors of severity and compliance history.

diligence in ascertaining and following program requirements. A medium degree of culpability indicates that the violation is the result of the facility's failure to exercise reasonable care in adhering to program requirements appropriate to the particular circumstances. A high degree of culpability indicates that the violation was in reckless disregard of program requirements or was the result of a deliberate act.⁹⁰ A graduated culpability factor is associated with the degree of culpability. An upward adjustment is not appropriate in all cases. For purposes of this category, violations of Consent Orders or other orders are presumed to be the result of a medium or high degree of culpability.

To calculate the adjustment using the culpability factor, staff:

- Based on a review of the facts surrounding the violation, determine the degree of culpability associated with the facility's actions.
- Multiply the Category 1.a subtotal on the Worksheet by the appropriate Culpability Factor (0 for low, 0.5 for medium, and 1.0 for high).
- Write the calculated charge into the "Amount" column for Category 1.b.(3) on the Worksheet.

- c. **Flow Reduction Factor:**⁹¹ The gravity-based component total may be reduced for small sewage treatment plants ("STPs"). The reduction is discretionary and is based on good faith efforts to comply. The factor relies on average daily STP flow, as follows:

FLOW REDUCTION FACTOR	
Average Daily Flow (gpd)	Percent Reduction
9,999 or less	50
10,000 – 29,999	30
30,000 – 99,999	10
100,000 and above	No Reduction

If the reduction is being considered for a non-municipal STP, staff should ensure that the facility or parent company employs less than 100 individuals. In using the flow reduction factor, staff multiply the gravity-based component total by the appropriate percentage figure (*e.g.*, for a facility with less than 5,000 gallons per day ("gpd") average daily flow, the appropriate percentage reduction is 50%) to obtain the reduction amount. Using the appropriate Worksheet, staff subtract the reduction

⁹⁰ Evidence of a deliberate act may be grounds for a referral to criminal investigative authorities.

⁹¹ This criterion relates to the statutory factor of environmental harm.

amount from the gravity-based component total to obtain the flow-adjusted gravity-based component total.

2. Economic Benefit of Noncompliance⁹²

In assessing civil penalties the “economic benefit of noncompliance” should be taken into consideration. This factor is included in a civil charge to ensure the charge acts as a deterrent to noncompliance. At a minimum, a civil charge or civil penalty should remove any significant economic benefit of noncompliance in addition to a “gravity component.” By developing a civil charge assessment structure that incorporates this deterrent effect, an enforcement action removes any economic gain that a source or facility accrues by avoiding or delaying costs necessary to achieve compliance, or from illegal competitive advantage (“ICA”).⁹³ The existence of a significant economic benefit gained from noncompliance is evaluated on a case-by-case basis. Staff use professional judgment when making the preliminary determination that economic benefit exists. When there is evidence of economic benefit based on delayed or avoided costs, or ICA, staff should estimate the value of the economic benefit and include this amount on the Worksheet.

EPA’s BEN model is a method for calculating economic benefit from delayed and avoided expenditures. If the economic benefit exceeds \$10,000, BEN should be used. BEN uses several data variables, most of which contain default values. The required variables include information about capital and non-capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. BEN allows a cooperative facility to provide actual financial data that may affect the civil charge calculation. For economic benefit calculations of less than \$10,000 or where the facility will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including their best professional judgment.⁹⁴ Finally, methods other than BEN may be used to calculate economic benefit of noncompliance, where the Department concludes that an alternative method provides more meaningful results.

A necessary first step when making a preliminary determination of an economic benefit is understanding the costs avoided or delayed through noncompliance. A delayed cost is an expenditure that, through current noncompliance, can be put off to sometime in the future. An avoided cost is an

⁹² This criterion relates to the statutory factor of economic benefit.

⁹³ Illegal competitive advantage occurs when the party’s noncompliant actions allow it to attain a level of revenues that would not have been obtainable otherwise, *e.g.*, selling a product using water resources in excess of permitted amounts, or draining/filling and selling wetlands without appropriate permits.

⁹⁴ Staff may use the following “rule-of-thumb” in exercising their judgment: for delayed compliance, 6% per year of the delayed on-time capital costs for the period from the date the violation began until the date compliance was or is expected to be achieved; for avoided costs, the expenses avoided until the date compliance is achieved.

expenditure that will not be made due to noncompliance. Examples of avoided costs include, but are not limited to:

- Monitoring and reporting (including costs of the sampling and proper laboratory analysis); and
- Operation and maintenance expenses (*e.g.*, labor, power, chemicals) and other annual expenses.

Examples of delayed costs include, but are not limited to:

- Capital equipment improvement or repairs (including engineering design, purchase, installation, and replacement);
- One-time acquisitions (such as equipment or real estate purchases); and
- Costs associated with providing required compensatory mitigation for surface water/wetland impacts (such as creation/restoration of wetlands, purchase or mitigation bank credits, *etc.*).

The intent is to recoup the economic benefit of noncompliance in all cases. There are four general areas, however, where settling the total civil charge amount for less than the economic benefit may be appropriate. The four exceptions are:

- The economic benefit component has *de minimis* value to the overall settlement;
- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that the Department will be able to recover the economic benefit in litigation; and
- The facility has successfully documented an inability to pay the total proposed civil charge.

In VPDES cases, especially municipal VPDES cases, it can be difficult to determine a clear “start date” for calculating the delayed costs of noncompliance. It is not unusual for facilities to need significant time to evaluate biological processes and/or infrastructure needs before settlement terms can be finalized. Issues like government appropriations, land availability, public participation and other facts not wholly within the control of a permittee can reasonably delay compliance. Finally, it is not unusual that savings that might have been realized from delayed costs are overtaken and surpassed by the increased construction costs resulting from delayed construction. Therefore, the calculation of the delayed costs of noncompliance should be commenced at such time as a VPDES facility fails or ceases to make a timely, diligent, and good faith effort to comply, while doing all it can to assure high quality treatment.

3. Ability to Pay a Civil Charge⁹⁵

Ability to pay is one of the five statutory factors. In general, the Department will reduce penalty assessments that are clearly beyond the means of the party. At the same time, it is important that the regulated community not perceive the violation of environmental requirements as cost savings for financially-troubled businesses, and the Department will, in appropriate circumstances, continue to seek penalties where a business has failed to allocate environmental compliance costs in their business operations. It is also unlikely that the Department would reduce a penalty where a facility refuses to correct a serious violation, or where a party has a long history of previous violations, or where the violations of the law are particularly egregious.

The burden to demonstrate inability to pay rests on the regulated party, as it does with any mitigating circumstance. A party's inability to pay usually will reduce a civil charge only if the regulated party provides sufficient information to justify the adjustment, through the use of the EPA computer models ABEL, INDIPAY, or MUNIPAY.

If a facility is unable to pay the calculated civil charge or would be prevented from carrying out essential remedial measures by doing so, the Department should consider the following options with the facility in the order presented:

- Installment payment plan with appropriate interest;
- Delayed payment schedule with appropriate interest; and
- Reduction, up to the full amount of the civil charge, including economic benefit, based on ability to pay modeling.

Regardless of the Department's determination of an appropriate penalty amount to pursue based on ability-to-pay considerations, the party is always expected to comply with the applicable law, regulations, orders, and permit conditions.

E. ADJUSTMENTS IN THE ENFORCEMENT RECOMMENDATION AND PLAN⁹⁶

The Department may adjust a civil charge downward in the ERP at several points in its calculation: (1) staff may adjust the gravity component of the civil charge before economic benefit is added; and (2) staff may also reduce the total civil charge for specific litigation and strategic considerations.

⁹⁵ This criterion relates to the statutory factor of ability to pay.

⁹⁶ This criterion relates to all of the statutory factors.

For all adjustments, staff should clearly document the adjustment calculation and its reasons for the adjustment either in the ERP itself, or on the [Civil Charge/Civil Penalty Adjustment Form](#), which is attached to the ERP. A revised ERP and/or Adjustment Form may be required, depending on when the Department makes the adjustments. The appropriate level of management should approve all adjustments. Decisions regarding adjustment are not subject to administrative appeal or judicial review.

1. Charge Adjustments Before Considering Economic Benefit⁹⁷

The Department may adjust the gravity component of a civil charge – excluding the economic benefit calculation – downward by up to 30% based on several factors where there are clearly documented, case-specific facts that support the adjustment as provided in this section. This adjustment is not appropriate in all cases. Staff may consider the following factors: cooperativeness/quick settlement; promptness of injunctive response/good faith effort to comply; and size and type of the facility/owner.

The gravity component may be reduced by more than 30% if appropriate circumstances exist. Staff should document the basis for reducing a charge beyond 30% on the Civil Charge/Civil Penalty Adjustment Form. Regional staff should consult with DE when considering an adjustment beyond 30%. DE staff evaluate the adjustment for appropriateness and consistency.

- **Cooperativeness/quick settlement:** The Department may adjust a charge where a facility is cooperative in resolving the case in a timely and appropriate manner and it makes a good faith effort to settle the violations quickly.
- **Promptness of injunctive response/good faith effort to comply:** Good faith efforts to comply with regulatory requirements or permit conditions include prompt reporting of noncompliance, prompt initiation of corrective action, prompt correction of environmental problems, and cooperation during the investigation. Owners who agree to expedited corrective action schedules may also qualify. Staff should consider institutional or legal limitations on corrective actions. For example, a municipality may be unable to institute corrective action immediately because of funding procedures.
- **Size and type of facility/owner:** Reductions may be appropriate for small facilities. Such a reduction, however, may not be appropriate for a small facility owned by a large corporation. Facilities providing a critical community service (*e.g.*, municipal plants in isolated or economically

⁹⁷ This criterion relates to the statutory factors of compliance history, severity, environmental harm, and ability to pay.

distressed areas, hospitals, and schools) may be appropriate for this reduction.

2. **Litigation and Strategic Considerations**⁹⁸

The Department may also adjust a civil charge downward – including the economic benefit of noncompliance - for specific litigation and strategic considerations. Adjustments for litigation and strategic considerations should be carefully considered and documented. Before reducing a charge for litigation or strategic considerations, regional staff should discuss the proposed reduction with DE. Staff may reduce the Total Civil Charge based on documented strategic considerations, including:

- **Problems of Proof:** Problems with proving the case may be due to inadequate information, conflicting evidence, or contributory activity by the Department. In many cases problems of proof are considered as part of the Litigation Potential, but may also be considered independently.
- **Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment:** The impact or threat of impact is a factor used in conjunction with other strategic considerations. It could provide additional justification for a reduction if there is a lack of impact, or reason to reject a reduction if impacts are consequential. The evaluation should include a broad assessment of environmental impact and not be limited to just the media where the violation occurred.
- **The Precedential Value of the Case:** Resolution of certain cases may establish a valued endorsement of an agency program or regulatory or enforcement initiative. A reduction to the proposed civil charge may be appropriate to obtain such a precedent.
- **Probability of Meaningful Recovery of a Civil Charge:** In certain cases, information available to the Department indicates that recovery of a meaningful civil charge is not possible. Recognizing that a portion of the civil charge is intended to serve as deterrence, this factor may be appropriate for use with local governments and publicly funded service authorities. Also, in situations where the entity primarily responsible for the violation can not be held accountable, it may not be appropriate to assess the full civil charge against those left responsible for correction.
- **Litigation Potential:** Through negotiations it may become apparent that the case is destined for litigation based solely on factors not relevant to environmental protection.

It may also be appropriate, in the ERP or Adjustment Form, to include authority to increase a civil charge or civil penalty for continuing or uncorrected

⁹⁸ This criterion relates to all of the statutory factors.

violations, previously undiscovered violations, or for economic benefits from continuing delays in compliance, to provide additional incentives to resolve the action expeditiously.

F. CIVIL PENALTIES IN § 10.1-1186 PROCEEDINGS AND FORMAL HEARINGS

When an appropriate civil charge cannot be agreed upon with the consent of the party, the Department may elect to use an adversarial administrative process. Civil penalties are available following §10.1-1186 Proceedings⁹⁹ and following certain Formal Hearings.¹⁰⁰ In these actions, the penalty is pled and argued rather than established by consent. By statute, penalties are limited to a maximum of \$10,000 in a §10.1-1186 Proceeding and, following a Formal Hearing, \$32,500 for each violation, not to exceed \$100,000 per order.

DE is generally the lead in adversarial administrative processes. Staff should use the Worksheet and specific criteria in Sections IV B through IV E¹⁰¹ to determine the amount to be sought in a Formal Hearing, but in preparing the documents, staff should resolve any reasonable issues or questions in favor of the Department. In Formal Hearings, staff should seek the highest penalty justified by all of the facts, up to \$100,000 per order. The calculation is not limited to the amount that may have been offered in attempting to reach a settlement. Any adjustment for “cooperativeness” or for “promptness of injunctive response/good faith effort to comply” should be omitted in seeking a civil penalty in a Formal Hearing. By statute, the person must be provided with the calculation for the proposed penalty prior to any Formal Hearing conducted for an order that assesses penalties.¹⁰² If the case is settled while the proceeding is still pending, the penalty can be modified and calculated as any civil charge, described above. Any adjustment should be documented in a revised Worksheet or the ERP. The development of a penalty amount to be pled in a judicial complaint is not covered in this guidance.¹⁰³

⁹⁹ See Va. Code [§ 10.1-1186 \(10\)](#) (special orders); [§ 10.1-1182](#) (special order defined, with limit of \$10,000 and duration of not more than 12 months); and Va. Code [§ 2.2-4019](#) (informal fact finding proceedings under the Administrative Process Act). The informal fact-finding can be before the Director of the Department or his designee; however, the Director may not delegate his authority to impose civil penalties in such proceedings.

¹⁰⁰ See Va. Code [§ 62.1-44.15 \(8a\)](#) and [§ 2.2-4020](#) (formal hearings; litigated issues under the Administrative Process Act). For Formal Hearings with civil penalties, the hearing must be before an officer appointed by the Virginia Supreme Court.

¹⁰¹ The statutory factors are those noted in the referenced sections, or in subsequent Water Program worksheets.

¹⁰² [2005 Acts, c. 706](#); Va. Code [§ 62.1-44.15 \(8a\)](#).

¹⁰³ Authority for civil penalties in judicial proceedings may be found at Va. Code [§ 62.1-44.32 \(a\)](#).

WATER CIVIL CHARGE/CIVIL PENALTY WORKSHEET <u>Va. Code § 62.1-44.15</u> <i>(For Violations Other Than VWPP, Article 9, Article 11, Surface Water/Ground Water Withdrawal, and AFO/Poultry Programs)</i>									
Facility/Responsible Party			EA No.		Per./Reg. No.		NOV Date		
			Data		Potential for Harm			Amount	
					Serious	Moderate	Marginal		
1. Gravity-based Component									
a. Violations and Frequency (per month unless otherwise noted)					\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences		
(1) Effluent Limits (per parameter per month, or longer, specified interval)			Y	N	1,300 (x) ____	700 (x) ____	300 (x) ____		
(2) Operational Deficiencies			Y	N	1,300 (x) ____	700 (x) ____	300 (x) ____		
(3) Monitoring/Submissions			Y	N	1,300 (x) ____	700 (x) ____	300 (x) ____		
(4) Bypasses/Overflows (per day or per event) (applies to high flow/wet weather conditions where O&M is otherwise in compliance)			Y	N	650 (x) ____	390 (x) ____	130 (x) ____		
(5) Spills/Unpermitted Discharge (per day or per event)			Y	N	13,000 (x) ____	6,500 (x) ____	1,300 (x) ____		
(6) Compliance/Construction/Payment Schedules			Y	N	1,300 (x) ____	700 (x) ____	300 (x) ____		
(7) No Permit			Y	N	5,200 (x) ____	2,600 (x) ____	900 (x) ____		
(8) Failure to Report (per event per month)			Y	N	13,000 (x) ____	6,500 (x) ____	1,300 (x) ____		
(9) BMPs and/or E&S controls not installed or maintained (storm water)			Y	N	6,500 (x) ____	2,600 (x) ____	1,300 (x) ____		
(10) Failure to record inspections (storm water)			Y	N	1,300 (x) ____	650 (x) ____	260 (x) ____		
(11) No SWPPP (per event) (storm water)			Y	N	9,100 (x) ____	5,200 (x) ____	1,300 (x) ____		
(12) Incomplete SWPPP or SWPPP not on site (per event) (storm water)			Y	N	2,600 (x) ____	1,300 (x) ____	650 (x) ____		
(13) Other			Y	N	2,600 (x) ____	1,300 (x) ____	700 (x) ____		
Subtotal 1.a – Violations and Frequency									
b. Aggravating Factors									
(1) Major Facility			Y	N	Subtotal #1.a (x) 0.4				
(2) Compliance History Administrative/Judicial Order Violations			Y	N	Subtotal #1.a (x) 0.5				
(3) Degree of Culpability (<i>applied to subtotal #1.a</i>)			Y	N	Low = 0	Medium = #1.a (x) 0.5	High = #1.a (x) 1.0		
Subtotal 1 b. – Aggravating Factors									
Subtotal - Gravity Based Component Subtotal (<i>Add Subtotal #1.a and Subtotal #1.b</i>)									
c. Flow Reduction Factor (<i>STP VPDES only</i>) (<i>discretionary based on good faith efforts to comply</i>)			Y	N	% Reduction		Reduction Amount	()	
Flow-Adjusted Gravity Based Component Subtotal (<i>Subtract Subtotal 1.c from Gravity Based Component Subtotal</i>)									
2. Economic Benefit of Noncompliance									
3. Ability to Pay (<i>based on information supplied by the facility</i>)									
Total Civil Charge/Civil Penalty (<i>may not exceed \$32,500 per day per violation for violations on and after July 1, 2005, and \$25,000 per day per violation for previous violations</i>) (<i>may not exceed \$11,000 per violation, with a maximum limit of \$157,500, for SSO violations in consent orders requiring SSO corrective action</i>).									\$

Comments:

G. VIRGINIA WATER PROTECTION PERMIT PROGRAM

The Virginia Water Protection Permit (“VWPP”) Program is authorized under Va. Code [§ 62.1-44.15:5](#). The section addresses excavation, filling, dumping in, or other activities regarding surface waters and wetlands, but also states that conditions contained in a VWPP may include the volume of water which may be withdrawn from instream flows as a part of the permitted activity.¹⁰⁴ Authority for negotiated civil charges for alleged VWPP violations is found in the same statute as before, Va. Code [§ 62.1-44.15 \(8d\)](#).¹⁰⁵ The maximum penalty is \$32,500 per day for each violation.

Civil charges for the VWPP Program are calculated using the Worksheet at the end of this section. The specific criteria for calculating the civil charge or civil penalty are listed in the Worksheet, along with the associated statutory factors (in parentheses). The Potential for Harm classification should reflect the scale of activity and the considerations cited in [Section IV C](#). In the “Compliance History” adjustment, staff consider prior enforcement activities of any Water Law, regulations, orders, or permits in the preceding 36 months. Prior enforcement activities include any act or omission resulting in an “enforcement response,” *e.g.*, a Warning Letter, NOV, or other enforcement document. The Department does not consider Warning Letters and NOVs that it did not pursue (*e.g.*, matters that were closed without the issuance of a letter of agreement, consent or administrative order, consent decree, or court order).

One distinction for VWPP permits lies in the calculation of economic benefit of noncompliance. While the BEN model may be used as appropriate, BEN often fails to capture adequately the “illegal competitive advantage” (“ICA”) that may arise from wetlands violations. It may be necessary to use other standard accounting practices to determine the level of revenues that would have been unattainable had the responsible party abided by the law. For example, if a party improperly filled wetlands and sold the property as sites for homes, the profit from the sale may be addressed as an element of the economic benefit of noncompliance. Such profits are not accounted for as delayed or avoided pollution control costs under BEN model calculations. Economic benefit for water withdrawal under a VWPP permit is another example where BEN may not be sufficient. For example, if a plant were to exceed its withdrawal rate, it may result in a profit from the sale of a product to which the plant was not entitled. Here as elsewhere, the economic benefit should also include any costs avoided in permit fees and tax or revenue benefits.

Staff should mark “Y” or “N” for each type of violation and apply the appropriate multiplier in the Worksheet. The charge is then entered into the “Amount” column. Except as noted, the considerations in Sections IV A through E apply, including the ERP adjustment factors. Special considerations for pleading civil penalties in §10.1-1186 Proceedings or in Formal Hearings are discussed in [Section IV F](#).

¹⁰⁴ Va. Code [§ 62.1-44.15:5 \(C\)](#)

¹⁰⁵ Va. Code [§ 62.1-44.15](#) incorporates by reference the penalty amounts from Va. Code [§ 62.1-44.32](#). For violations that occurred prior to July 1, 2005, the maximum civil charge is \$25,000 per violations per day.

VA WATER PROTECTION PROGRAM CIVIL CHARGE/CIVIL PENALTY WORKSHEET

[Va. Code § 62.1-44.15](#)

Permittee/Responsible Party	Data		Reg. No.	Date			Amount
Potential for Harm <i>(Environmental Harm and Severity)</i>							
Serious			Moderate	Marginal			
1. Gravity Factors – Surface Water and Wetlands <i>(Severity and Environmental Harm)</i>							
Violations and Frequency	\$ (x) occurrences		\$ (x) occurrences	\$ (x) occurrences			
a. Failure to obtain coverage under a General Permit (GP) or Individual Permit (IP) prior to commencing activity	Y	N	26,000 (x) ____	13,000 (x) ____	2,600 (x) ____		
b. Exceeding permitted impacts (not to be used in conjunction with 1.a.)	Y	N	26,000 (x) ____	13,000 (x) ____	2,600 (x) ____		
c. Failure to complete compensatory mitigation	Y	N	26,000 (x) ____	13,000 (x) ____	2,600 (x) ____		
d. Any activity resulting in a fish kill	Y	N	26,000 (x) ____	13,000 (x) ____	2,600 (x) ____		
e. Failure to report a fish kill, fuel, or oil spill	Y	N	13,000 (x) ____	6,500 (x) ____	1,300 (x) ____		
f. Failure to undertake required corrective action relative to unsuccessful compensatory mitigation.	Y	N	6,500 (x) ____	2,600 (x) ____	1,300 (x) ____		
g. Failure to conduct required compensatory mitigation monitoring or water quality monitoring	Y	N	13,000 (x) ____	6,500 (x) ____	1,300 (x) ____		
h. Failure to conduct required construction monitoring	Y	N	6,500 (x) ____	2,600 (x) ____	1,300 (x) ____		
i. Failure to provide required notice prior to commencing construction	Y	N	13,000 (x) ____	2,600 (x) ____	1,300 (x) ____		
j. Failure to submit plans and specifications prior to commencing construction	Y	N	6,500 (x) ____	2,600 (x) ____	1,300 (x) ____		
k. Unauthorized discharge of pollutants	Y	N	6,500 (x) ____	2,600 (x) ____	1,300 (x) ____		
l. Failure to comply with construction special conditions (such as, but not limited to, storm water management, erosion & sediment control, flagging non-impact areas, restoring temporary impacts, working in the dry time-of-year restrictions, minimum instream flow, sidecasting in streams, operating equipment in streams, discharge of concrete to waters, etc.)	Y	N	6,500 (x) ____	2,600 (x) ____	1,300 (x) ____		
m. Failure to submit a complete, final compensatory mitigation plan	Y	N	6,500 (x) ____	1,300 (x) ____	700 (x) ____		
n. Other violations not listed above (such as, but not limited to, failing to record easements; certify reports; submit complete construction, mitigation, or water quality monitoring reports; submit as-built surveys; notify of permit transfer, etc.)	Y	N	6,500 (x) ____	1,300 (x) ____	700 (x) ____		

1A Gravity Factors – Water Withdrawal (Severity and Environmental Harm)						
Violations and Frequency			\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences	
a. Exceedance of daily withdrawal limits (per day)	Y	N	1,300 (x) ____	700 (x) ____	100 (x) ____	
b. Exceedance of monthly withdrawal limits (per month)	Y	N	2,600 (x) ____	1,300 (x) ____	700 (x) ____	
c. Exceedance of annual withdrawal limits	Y	N	5,200 (x) ____	2,600 (x) ____	1,300 (x) ____	
d. Failure to submit annual monitoring reports (per report)	Y	N	1,300 (x) ____	700 (x) ____	300 (x) ____	
e. Unpermitted withdrawal (per day or per event)	Y	N	13,000 (x) ____	6,500 (x) ____	1,300 (x) ____	
f. Failure to submit appropriate permit application	Y	N	5,200 (x) ____	2,600 (x) ____	1,300 (x) ____	
g. Failure to report (requested application, water audit, new well, etc) (per event)	Y	N	2,600 (x) ____	1,300 (x) ____	700 (x) ____	
h. Failure to mitigate	Y	N	13,000 (x) ____	6,200 (x) ____	1,300 (x) ____	
i. Failure to install and/or maintain equipment or other operational deficiencies	Y	N	2,600 (x) ____	1,300 (x) ____	650 (x) ____	
j. Incomplete or improper reporting	Y	N	2,600 (x) ____	1,300 (x) ____	650 (x) ____	
k. Other, Violation of Permit, Special Exceptions, or Special Conditions NOT listed above (e.g., time of year, minimum instream flow requirements, failure to report spills) (per event)	Y	N	2,600 (x) ____	1,300 (x) ____	700 (x) ____	
Violations and Frequency Subtotal						
2. Aggravating Factors (Severity and Compliance History)						
a Administrative/Judicial Order Violations	Y	N	Subtotal 1 (x) 0.5			
b Degree of Culpability	Y	N	Low = 0	Medium = #1 (x) 0.5	High = #1 (x) 1.0	
c History of Noncompliance (past 36 months)	Y	N	If yes, then = #1 (x) 0.5			
Aggravating Factor Subtotal						
Gravity-Based Component Subtotal (1+2)						
3. Economic Benefit of Noncompliance (Economic Benefit)						
4. Ability to Pay (Ability to Pay)						()
Total Civil Charge/Civil Penalty (may not exceed \$32,500 per day per violation for violations on and after July 1, 2005, and \$25,000 per day per violation for previous violations)						\$

Comments:

H. REGULATED UNDERGROUND STORAGE TANK PROGRAM. (ART. 9)

The Regulated Underground Storage Tank (“UST”) Program is authorized under Article 9 of the State Water Control Law, Va. Code §§ [62.1-44.34:8](#) and [62.1-44.34:9](#). Article 9 typically addresses USTs for petroleum products, but also includes USTs for other “regulated substances,” as defined by statute. Authority for negotiated civil charges for violations of Regulated UST Program laws, regulations, orders is found in the Water Law at Va. Code § [62.1-44.15 \(8d\)](#). The maximum civil charge is \$32,500 per day for each violation on and after July 1, 2005.¹⁰⁶

Civil charges and civil penalties for the Regulated UST Program are calculated much as they are for other Water Programs. The specific criteria for calculating the civil charge or civil penalty are listed in the following Worksheet, along with the associated statutory factors (in parentheses). Note that separate violations found in an inspection (e.g., release detection, corrosion protection, spill prevention, or overfill prevention) are ordinarily assessed separately on the Worksheet, even if they fall under the same Worksheet row. In the “Compliance History” adjustment, staff consider prior enforcement activities of any Water Law, regulations, orders, or permits in the preceding 36 months. Prior enforcement activities include any act or omission resulting in an “enforcement response,” e.g., a Warning Letter, NOV, or other enforcement document. The Department does not consider Warning Letters and NOVs that it did not pursue (e.g., matters that were closed without the issuance of a letter of agreement, consent or administrative order, consent decree, or court order).

Staff should mark “Y” or “N” for each type of violation and apply the appropriate multiplier in the Worksheet. The charge is then entered into the “Amount” column. Except as noted, the considerations in Sections IV A through E apply, including the ERP adjustment factors. Special considerations for pleading civil penalties in §10.1-1186 Proceedings or in Formal Hearings are discussed in [Section IV F](#).

¹⁰⁶ Va. Code § [62.1-44.15](#) incorporates by reference the penalty amounts from Va. Code § [62.1-44.32](#). For violations that occurred prior to July 1, 2005, the maximum civil charge is \$25,000 per violations per day.

ARTICLE 9 – REGULATED UST PROGRAM CIVIL CHARGE/CIVIL PENALTY WORKSHEET Va. Code § 62.1-44.15							
Facility/Responsible Party	Reg./Id. #		NOV Date				
	Data	Potential for Harm (Environmental Harm and Severity)			Amount		
		Serious	Moderate	Marginal			
1. Violations and Frequency* (Severity and Environmental Harm)							
a. Failure to Report a Release or a Suspected Release	Y	N	\$ 13,000	\$ 6,500	\$ 1,300		
b. Corrective Action /Monitoring/Closure Report Not Submitted	Y	N	\$1,300 per phase	\$700 per phase	\$300 per phase		
c. Failure to Investigate, Abate, or Remediate a Release	Y	N	\$ 5,200	\$ 2,600	\$ 1,300		
d. Tank system Installed, Upgraded, Equipped, or Closed Improperly (per violation)	Y	N	\$2,600 per tank *	\$1,300 per tank *	\$700 per tank *		
e. Tank System Operated Improperly (per violation)	Y	N	\$1,300 per tank *	\$700 per tank *	\$300 per tank *		
f. No CAP or Failure to Execute a CAP	Y	N	\$ 2,600	\$ 1,300	\$ 700		
g. Failure to Demonstrate Financial Assurance	Y	N	\$ 1,300	\$ 700	\$ 300		
h. Compliance Records not Available	Y	N	\$ 1,300	\$ 700	\$ 300		
i. Improper/No Registration	Y	N	\$1,300 per tank *	\$700 per tank *	\$300 per tank *		
j. Other Violation Component	Y	N	\$ 1,300	\$ 700	\$ 300		
* per tank or, if compartments, per tank compartment							
Violations and Frequency Subtotal							
2. Degree of Culpability (Severity and Compliance History)		Y	N	Low = 0	Medium = (x) 0.5	High = (x) 1.0	
3. History of Noncompliance (Compliance History) (past 36 months)		Y	N	Subtotal 1 (x) 0.5			
Gravity- Based Subtotal (Subtotal 1+2+3)							
4. Economic Benefit of Noncompliance (Economic Benefit)							
5. Ability to Pay (based on information supplied by the responsible party) (Ability to Pay)							()
Total Civil Charge/Civil Penalty (may not exceed \$32,500 per day per violation for violations on and after July 1, 2005, and \$25,000 per day per violation for previous violations)							\$

Comments:

I. DISCHARGE OF OIL TO STATE WATERS AND ABOVEGROUND STORAGE TANKS (ART. 11)

Article 11 of the State Water Control Law¹⁰⁷ establishes a unique civil charge scheme for the discharge of oil to state waters, for violations related to aboveground storage tanks (“ASTs”), and for violations of underground storage tanks not regulated under Article 9. Under Va. Code [§ 62.1-44.34:20 \(C\)](#):

Any person who violates or causes or permits to be violated a provision of [Article 11], or a regulation, administrative or judicial order, or term or condition of approval issued under this article, shall be subject to a civil penalty for each such violation as follows:

1. For **failing to obtain approval of an oil discharge contingency plan** as required by [§ 62.1-44.34:15](#), not less than \$1,000 nor more than \$50,000 for the initial violation, and \$5,000 per day for each day of violation thereafter;
2. For **failing to maintain evidence of financial responsibility** as required by [§ 62.1-44.34:16](#), not less than \$1,000 nor more than \$100,000 for the initial violation, and \$5,000 per day for each day of violation thereafter;
3. For **discharging or causing or permitting a discharge of oil into or upon state waters, or owning or operating any facility, vessel or vehicle from which such discharge originates** in violation of [§ 62.1-44.34:18](#), up to \$100 per gallon of oil discharged;
4. For **failing to cooperate in containment and cleanup of a discharge** as required by [§ 62.1-44.34:18](#) or for **failing to report a discharge** as required by [§ 62.1-44.34:19](#), not less than \$1,000 nor more than \$50,000 for the initial violation, and \$10,000 for each day of violation thereafter; and
5. For **violating or causing or permitting to be violated any other provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article**, up to \$32,500 for each violation. Each day of violation of each requirement shall constitute a separate offense.

Va. Code [§62.1-44.34:20 \(D\)](#) sets out separate statutory factors that must be considered in Article 11 civil charges and penalties:

- the willfulness of the violation;
- any history of noncompliance;
- the actions of the person in reporting, containing and cleaning up any discharge or threat of discharge;
- the damage or injury to state waters or the impairment of their beneficial use;

¹⁰⁷ Va. Code [§ 62.1-44.34:14](#), *et seq.*

- the cost of containment and cleanup;
- the nature and degree of injury to or interference with general health, welfare and property; and
- the available technology for preventing, containing, reducing or eliminating the discharge.

This section has three Worksheets to address civil charges and civil penalties under Article 11: the first is for enumerated violations in C (1), C (2), and C (4), as set out above;¹⁰⁸ the second is for the per gallon charges in C (3); and the third addresses the remaining Article 11 civil charges under C (5), including most AST violations.

The third Worksheet (for C (5) and most AST violations) is used as are others in this guidance and is self-explanatory. This Worksheet is set up and used much as the Worksheet for Regulated USTs; however, the statutory factors for Article 11 violations must be considered. If there is a specific violation of C (1) through C (4), then that violation should be addressed separately on the more specific Worksheet.

For violations of C (1) –C (4), staff select the appropriate Worksheet(s), and fill out a separate Worksheet for each violation, evaluating and assessing a dollar value within the range provided for each of the applicable statutory factors. The dollar values are then added and averaged as indicated on the Worksheets. For violations of C (3) (*e.g.*, oil spills), the average civil charge is multiplied by the total number of gallons of petroleum released to the environment to determine the unadjusted Total Civil Charge/Civil Penalty. The noncompliance period considered should ordinarily be limited to six months, but may be longer if, for example, there has been a slow leak. Staff use best professional judgment on the gallons spilled if better estimates are not available.

Adjustments may be made in the ERP, as they are for general Water Programs charges. These adjustment factors are discussed above in [Section IV E](#). The justification for applying an adjustment should be reasonable and documented in the ERP. Note that the governing statute prescribes minimum penalties for violations of C (1), C (2), and C (4). Civil charges should not be mitigated or waived below the statutory minimum amounts.

¹⁰⁸ Failure to have an oil discharge contingency plan is addressed under Section C (1), as part of a failure to have the plan approved, as required.

ARTICLE 11 - CIVIL CHARGE/CIVIL PENALTY WORKSHEET

Va. Code [§ 62.1-44.34:20 \(C\) \(1\), \(2\), and \(4\)](#)

1. Statutory Factors: Use a separate Worksheet for each violation. Discuss each and assign a dollar amount to each applicable factor as follows: <i>C (1) for failure to obtain approval of an oil discharge contingency plan, assign a dollar amount for each factor between \$1,000 and \$50,000 for the initial violation [for each subsequent day of violation the statutorily set penalty of \$5,000 per day may be used]</i> <i>C (2) for failing to maintain evidence of financial responsibility, assign a dollar amount for each factor between \$1,000 and \$100,000 for the initial violation [for each subsequent day of violation the statutorily set penalty of \$5,000 per day may be used]</i> <i>C(4) for failing to cooperate in containment and clean-up of a discharge or failing to report a discharge, assign a dollar amount for each factor between \$1,000 and \$50,000 for the initial violation [for each subsequent day of violation the statutorily set penalty of \$10,000 per day may be used]</i>	
a. Willfulness of Violation (To the extent that the violation appears more deliberate than accidental, the value of this factor will be higher rather than lower.)	Amount
	\$
b. Damage/Injury to State Waters or Impairment of Beneficial Use (To the extent that damage or impairment is clearly demonstrated, this factor will be higher rather than lower. NOTE: This factor is considered to be inapplicable to the violation of failure to obtain approval of an ODCP or failure to maintain evidence of financial responsibility.)	
	\$
c. History of Noncompliance (The more numerous the violations committed by the regulated party in the past, the higher this factor will be)	
	\$
d. Actions in Reporting/Containing/Cleaning Up the Discharge (The more prompt the actions in reporting/containing clean-up, the lower this factor will be. NOTE: This factor is considered to be inapplicable to the violation of failure to obtain approval of an ODCP or failure to maintain evidence of financial responsibility.)	
	\$
e. Cost of Containment and Clean Up (The higher the costs of containment and clean-up, the lower this factor will be. NOTE: This factor is considered to be inapplicable to the violation of failure to obtain approval of an ODCP or failure to maintain evidence of financial responsibility.)	
	\$
f. Nature/Degree of Injury to Health, Welfare and Property (The higher the degree of property damage or personal injury, the higher this factor will be. NOTE: This factor is considered to be inapplicable to the violation of failure to obtain approval of an ODCP or failure to maintain evidence of financial responsibility.)	
	\$
g. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge (The more readily accessible and the cheaper the technology to prevent, contain, reduce or eliminate the discharge, the higher this factor will be. NOTE: This factor is considered to be inapplicable to the violation of failure to obtain approval of an ODCP or failure to maintain evidence of financial responsibility.)	
	\$
2. Average Civil Charge Calculation	
	(Subtotal)/ two (2) = Average Civil Charge for C (1) or C 2) (Subtotal)/ seven (7) = Average Civil Charge for C 4)
	\$
3. Economic Benefit of Noncompliance	
	\$
4. Ability to Pay (based on information supplied by the party)	
	()
Total Civil Charge/Civil Penalty (first-day-of-violation charge and multi-day charge, plus economic benefit, less ability to pay)	
	\$

Comments

ARTICLE 11 - OIL SPILL CIVIL CHARGE/CIVIL PENALTY WORKSHEET <i>Va. Code §62.1-44.34:20 (C) (3)</i>				
<i>For discharging or causing or permitting a discharge of oil into or upon state waters, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18. Use a separate Worksheet for each violation.</i>				
Facility/Responsible Party	Reg./Id.#		NOV Date	
	Potential for Harm			Amount
1. Statutory Factors discuss each and assign a dollar amount to each factor between \$0 and \$100.				
a. Nature/Degree of Injury to Health, Welfare and Property	Serious	Moderate	Marginal	
	67-100	34-66	0-33	
				\$
b. Damage/Injury to State Waters or Impairment of Beneficial Use	Serious	Moderate	Marginal	
	67-100	34-66	0-33	
				\$
c. History of Noncompliance	>1 Enf. Action in Past 5 Yrs.		No Prior Enf. Action	
	67-100	34-66	0-33	
				\$
d. Actions in Reporting/Containing/Cleaning Up the Discharge	Poor	Fair	Excellent	
	67-100	34-66	0-33	
				\$
e. Cost of Containment and Clean Up (Relative to Amount of Oil Spilled)	High	Medium	Low	
	67-100	34-66	0-33	
				\$
f. Willfulness of the Violation	Deliberate	Negligent	Non-negligent	
	67-100	34-66	0-33	
				\$
g. Available Technology to Prevent/Contain/Reduce/Eliminate Discharge	Plentiful/ Cheap	Plentiful/ Costly	Scarce/ Expensive	
	67-100	34-66	0-33	
				\$
Subtotal				\$
2. Average Civil Charge Calculation				
Average Total Civil Charge (= Subtotal divided by seven (7))				\$
3. Economic Benefit of Noncompliance				\$
4. Ability to Pay (based on information supplied by the party)				()
Total Civil Charge/Civil Penalty (= Gallons Released (x) Average Civil Charge, plus economic benefit less ability to pay) (maximum of \$100 per gallon)				\$

Comments:

ARTICLE 11 – OTHER CIVIL CHARGE/CIVIL PENALTY WORKSHEET <i>Va. Code § 62.1-44.34:20 (C) (5) –oil violations not otherwise specified, including most AST violations</i>							
Facility/Responsible Party		Reg./Id. #		NOV Date			
		Data	Potential for Harm			Amount	
			Serious	Moderate	Marginal		
1. Violations and Frequency*							
a. Corrective Action /Monitoring/Closure Report Not Submitted		Y	N	\$1,300 per phase	\$ 700 per phase	\$ 300 per phase	
b. Tank system Installed, Upgraded, Equipped, or Closed Improperly (per violation)		Y	N	\$2,600 per tank *	\$1,300 per tank *	\$ 700 per tank *	
c. Tank System Operated Improperly (per violation)		Y	N	\$1,300 per tank *	\$ 700 per tank *	\$ 300 per tank *	
d. No CAP or Failure to Execute a CAP		Y	N	\$ 2,600	\$ 1,300	\$ 700	
e. Compliance Records not Available		Y	N	\$ 1,300	\$ 700	\$ 300	
f. Improper/No Registration		Y	N	\$1,300 per tank *	\$ 700 per tank *	\$ 300 per tank *	
g. Other Violation Component		Y	N	\$ 1,300	\$ 700	\$ 300	
* per tank or, if compartments, per tank compartment, unless otherwise noted							
Violations and Frequency Subtotal							
2. Adjustments (up to 0.5 violations and frequency component per adjustment)							
a. Willfulness of the violation							
b. History of noncompliance							
c. Actions of the person in reporting, containing and cleaning up any discharge or threat of discharge							
d. Damage or injury to state waters or the impairment of their beneficial use							
e. Cost of containment and cleanup							
f. Nature and degree of injury to or interference with general health, welfare and property							
g. Available technology for preventing, containing, reducing or eliminating the discharge.							
Adjustments Subtotal							
3. Economic Benefit of Noncompliance							
4. Ability to Pay (based on information supplied by the party)							()
Total Civil Charge/Civil Penalty (may not exceed \$32,500 per day per violation for violations on and after July 1, 2005, and \$25,000 per day per violation for previous violations)							\$

Note: If there is a violation of C (1) through C (4), then the appropriate Worksheet should be used separately to address that violation.

Comments:

J. GROUND WATER AND SURFACE WATER

With the consent of any person in violation of the chapter on Ground Water Management, Va. Code [§ 62.1-254, et seq.](#), or its associated regulations, orders, or permits, the Board may provide, in an order issued by the Board against the person, for the payment of civil charges of \$25,000 for each violation.¹⁰⁹ Staff should calculate an appropriate civil charge or civil penalty using the following Worksheet.

Serious, Moderate, and Marginal rankings are based on the annual water withdrawals of the facility and the environmental harm (*e.g.*, ground water management areas, saltwater intrusion, populated areas dependent on the resource, *etc.*). In the absence of specific environmental harm or areas more sensitive to excess withdrawal, a Marginal ranking is to be used for facilities permitted to withdraw 10 million gallons or less annually, Moderate for facilities permitted to withdraw less than 1 billion gallons but more than 10 million gallons annually, and Serious for facilities permitted to withdraw 1 billion gallons or more annually. In the case of unpermitted withdrawals, best professional judgment is to be used to estimate the annual withdrawal where withdrawals were not metered or readings may be suspect. Charges for the category of violations “Other, Violations of Special Conditions NOT listed above, *etc.*” is based upon the impact or potential impact to the resource and the regulatory program.

The Ground Water Withdrawal Civil Charge Worksheet further discusses the appropriate classification for violations. The violations are generally per occurrence. In the “Compliance History” adjustment, staff consider prior violations of any Water Law, regulation, order, or permit in the preceding 36 months. Prior violations include any act or omission resulting in an “enforcement response,” *e.g.*, a Warning Letter, NOV, or other enforcement document. The Department does not consider Warning Letters and NOVs that it did not pursue (*e.g.*, matters that were closed without the issuance of a letter of agreement, consent or administrative order, consent decree, or court order).

With the consent of any person in violation of the chapter on Surface Water Management Areas, Va. Code [§ 62.1-242, et seq.](#), the Board may provide, in an order issued by the Board against the person, for the payment of civil charges \$1,000 for each violation.¹¹⁰ Although not required by statute, staff should calculate an appropriate civil charge or civil penalty for each violation using the five statutory factors cited in the [Introduction](#) of this guidance.

If the surface water withdrawal is subject to a VWPP Permit, the civil charge or civil penalty should be calculated as described in [Section IV G](#).

Adjustments may be made in the ERP, as they are for general Water Programs charges. These adjustment factors are discussed above in [Section IV E](#). The justification for applying an adjustment should be reasonable and documented in the ERP.

¹⁰⁹ [Va. Code § 62.1-270](#)

¹¹⁰ [Va. Code § 62.1-252](#)

GROUND WATER WITHDRAWAL CIVIL CHARGE/CIVIL PENALTY WORKSHEET						
<u>Va. Code § 62.1-270 (A)</u>						
Facility/Responsible Party	Data		Reg./Id. #		NOV Date	
			Potential for Harm (Potential for Harm and Severity)			Amount
			Serious	Moderate	Marginal	
1. Violations and Frequency (<i>Severity and Environmental Harm</i>)			\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences	
a. Daily withdrawal limits (per day)	Y	N	1,000 (x) ____	500 (x) ____	100 (x) ____	
b. Monthly withdrawal limits (per month)	Y	N	2,000 (x) ____	1,000 (x) ____	500 (x) ____	
c. Annual withdrawal limits	Y	N	4,000 (x) ____	2,000 (x) ____	1,000 (x) ____	
d. Failure to submit quarterly monitoring reports (per quarter)	Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____	
e. Unpermitted withdrawal	Y	N	10,000 (x) ____	5,000 (x) ____	1,000 (x) ____	
f. Failure to submit appropriate permit application	Y	N	4,000 (x) ____	2,000 (x) ____	1,000 (x) ____	
g. Failure to report/incomplete or improper reporting (requested application, water audit, new well, etc) (per event)	Y	N	2,000 (x) ____	1,000 (x) ____	500 (x) ____	
h. Failure to mitigate	Y	N	10,000 (x) ____	5,000 (x) ____	1,000 (x) ____	
i. Failure to install and/or maintain equipment or other operational deficiencies	Y	N	2,000 (x) ____	1,000 (x) ____	500 (x) ____	
j. Other, Violation of Permit, Special Exceptions or Special Conditions NOT listed above (per event)	Y	N	2,000 (x) ____	1,000 (x) ____	500 (x) ____	
Violations and Frequency Subtotal						
2. Adjustment Factors						
a. Degree of Culpability (<i>Severity and Environmental Harm</i>)	Y	N	Low = 0	Medium = (x) 0.5	High = (x) 1.0	
b. History of Noncompliance (past 36 months) (<i>Compliance History</i>)	Y	N	If yes, then = (x) 0.5			
c. Violation of Order or Decree (<i>Compliance History</i>)	Y	N	n (x) 2	n (x) 1	n (x) 0.5	
Adjustment Subtotal						
3. Economic Benefit of Noncompliance (<i>Economic Benefit</i>)						
4. Ability to Pay (<i>based on information supplied by the responsible party</i>) (<i>Ability to Pay</i>)						()
Total Civil Charge/Civil Penalty (<i>may not exceed \$25,000 per day per violation</i>)						\$

Comments:

K. ANIMAL FEEDING OPERATIONS AND POULTRY WASTE

Under Code § [62.1-44.17:1\(J\)](#), permittees in violation of confined Animal Feeding Operation (“AFO”) general Virginia Pollutant Abatement (“VPA”) permits are subject to a maximum civil charge of \$2,500. Using the AFO Civil Charge/Civil Penalty Worksheet, staff assess appropriate civil charges on a per settlement action basis.

In calculating the appropriate civil charge, staff assess the gravity-based component of the charge by selecting the appropriate violation category and multiplying the individual charge noted by the number of occurrences of the violation. After calculating charges for each violation category, staff add the charges to arrive at a subtotal. The noncompliance period considered should generally be limited to six months. Aggravating factors, including threats to human health and safety, environmental damage caused by the violation, administrative order or judicial decree violations or any evidence of deliberate acts or omissions are then considered. If an aggravating factor is present, staff multiply the charge subtotal by the aggravating factor multiplier of 1.5 and add it to the Subtotal to arrive at the civil charge.

Adjustments may be made in the ERP, as they are for general Water Programs charges. These adjustment factors are discussed above in [Section IV E](#). The justification for applying an adjustment should be reasonable and documented in the ERP.

The Total Civil Charge minus adjustments results in the Final Recommended Civil Charge in the ERP. In no event may the Final Recommended Civil Charge for AFO general permit violations exceed \$2500. However, onsite violations not addressed under the AFO section of the Water Law (*e.g.*, discharges of pollutants to state waters without a permit), do not fall under the statutory penalty cap and should be assessed separately using the general [Water Civil Charge/Civil Penalty Worksheet](#).

Under Va. Code § [62.1-44.17:1.1](#), poultry waste management civil charges may be imposed. Any person violating this section, or its associated regulations, orders, or permits, shall be subject only to the provisions of §§ [62.1-44.23](#) and [62.1-44.32 \(a\)](#), except that any civil charge shall not exceed \$2,500 for any confined animal feeding operation covered by a VPA permit. A Poultry Waste Civil Charge/Civil Penalty Worksheet for such violations follows.

Both the AFO and the Poultry Waste Worksheets may apply to operations where both activities take place.

Adjustments may be made in the ERP, as they are for general Water Program charges. These adjustment factors are discussed above in [Section IV E](#). The justification for applying an adjustment should be reasonable and documented in the ERP.

AFO CIVIL CHARGE/CIVIL PENALTY WORKSHEET						
<u>Va. Code § 62.1-44.17:1 (J)</u>						
Facility/Responsible Party			Reg./Id. #		NOV Date	
					Potential For Harm (Environmental Harm and Severity)	
			Data	Serious	Moderate	Marginal
1. Violations and Frequency (per occurrence per inspection unless otherwise noted) (<i>Severity and Environmental Harm</i>)					\$ (x) occurrences	\$ (x) occurrences
(a) Failure to monitor soils, waste or groundwater			Y	N	1,000 (x) ____	500 (x) ____
(b) Failure to maintain records			Y	N	1,000 (x) ____	500 (x) ____
(c) Improper documentation of liner, seasonal high water table, siting, design and construction			Y	N	500 (x) ____	300 (x) ____
(d) Improper operation and maintenance of waste storage facility (per incident)			Y	N	1,000 (x) ____	500 (x) ____
(e) Improper operation and maintenance of equipment (per incident) (including but not limited to checking for leaks, calibrations, having manufacturer's manuals on site)			Y	N	1,000 (x) ____	500 (x) ____
(f) NMP Violations (per incident)			Y	N	1,000 (x) ____	500 (x) ____
(g) Evidence of breached buffers or runoff (per incident)			Y	N	1,000 (x) ____	500 (x) ____
(h) Operator training requirements not met			Y	N	500 (x) ____	300 (x) ____
(i) Insufficient notice prior to animal placement or utilization of new waste storage facilities			Y	N	500 (x) ____	300 (x) ____
(j) Improper closure of waste storage facility			Y	N	1,000 (x) ____	500 (x) ____
(k) Other violations			Y	N	1,000 (x) ____	500 (x) ____
Violations and Frequency Subtotal						
2. Adjustment Factors (<i>multiply the Subtotal by 1.5 if any of the following factors apply</i>) (<i>circle</i>) (<i>Environmental Harm, Compliance History, and Severity</i>) (<i>Add to Violations and Frequency Subtotal</i>)						
Threat to Human Health or Safety		Environmental Damage		Administrative/ Judicial Order Viol.		Evidence of Deliberate Act or Omission
Adjustment Factor Subtotal						
3. Economic Benefit of Noncompliance (<i>Economic Benefit</i>)						
4.Ability to Pay (<i>based on information supplied by the responsible party</i>) (<i>Ability to Pay</i>)						()
Total Civil Charge/Civil Penalty (<i>not to exceed \$2500 when covered by a VPA permit</i>)						\$

Comments:

POULTRY WASTE CIVIL CHARGE/CIVIL PENALTY WORKSHEET <i>(for any confined animal feeding operation covered by a Virginia Pollution Abatement permit)</i> Va. Code § 62.1-44.17:1.1						
Facility/Responsible Party		Reg./Id. #		NOV Date		
		Potential For Harm <i>(Environmental Harm and Severity)</i>				
		Data	Serious	Moderate	Marginal	Amount
1. Violations and Frequency (per occurrence per inspection unless otherwise noted) (<i>Severity and Environmental Harm</i>)				\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences
(a) Failure to monitor soils, waste or groundwater		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(b) Failure to maintain records		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(c) Transfer of more than 10 tons of poultry waste without providing the nutrient analysis or fact sheet to recipient		Y	N	500 (x) ____	300 (x) ____	100 (x) ____
(d) Improper disposal of mortalities		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(e) Improper storage of poultry waste		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(f) Improper operation and maintenance of waste storage facility (per incident)		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(g) Nutrient Management Plan (NMP) Violations (per incident)		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(h) Improper winter land application of poultry waste or land application to soils that are saturated		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(i) Evidence of breached buffers or runoff (per incident)		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(j) Improper closure of poultry waste storage facility		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
(k) Operator training requirements not met		Y	N	500 (x) ____	300 (x) ____	100 (x) ____
(l) Other violations		Y	N	1,000 (x) ____	500 (x) ____	200 (x) ____
Violations and Frequency Subtotal						
2. Adjustment Factors (<i>multiply the Subtotal by 1.5 if any of the following factors apply</i>) (<i>circle</i>) (<i>Environmental Harm, History of Non Compliance, and Severity</i>) (<i>Add to the Violations and Frequency subtotal</i>).						
Threat to Human Health or Safety		Environmental Damage		Administrative/ Judicial Order Violation	Evidence of Deliberate Act or Omission	
Adjustment Factor Subtotal						
3. Economic Benefit of Noncompliance (<i>Economic Benefit</i>)						
4. Ability to Pay (<i>based on information supplied by the responsible party</i>) (<i>Ability to Pay</i>)						()
Total Civil Charge/Civil Penalty (<i>not to exceed \$2,500 when covered by a VPA permit</i>)						\$

ATTACHMENT 1 - ACRONYMS

AFO- Animal Feeding Operation
AST – Aboveground Storage Tank
BACT - Best Available Control Technology
BART: Best Available Retrofit Technology
BMP – Best Management Practices
CFR - Code of Federal Regulations
DE – Division of Enforcement
DMR – Discharge Monitoring Report
E&S - Erosion and Sediment
EMS – Environmental Management System
EPA – U.S. Environmental Protection Agency
ERP - Enforcement Recommendation and Plan
gpd – Gallons Per Day
HAPs - Hazardous Air Pollutants
HPV - High Priority Violator
ICA – Illegal Competitive Advantage
LAER - Lowest Achievable Emission Rate
MACT - Maximum Available Control Technology
NAAQS - National Ambient Air Quality Standards
NESHAP - National Emission Standard for Hazardous Air Pollutants
NOV - Notice of Violation
NMP – Nutrient Management Plan
NSPS - New Source Performance Standard
O&M - Operations and Maintenance
PCBs - Polychlorinated Biphenyls
PSD - Prevention of Significant Deterioration
RACT - Reasonable Available Control Technology
SEP – Supplemental Environmental Project
SM - Synthetic Minor
SNC - Significant Noncompliance (Water Programs); Significant Noncomplier (Hazardous Waste Program)
SSO – Sanitary Sewer Overflow
STP – Sewage Treatment Plant
SWPPP – Storm Water Pollution Prevention Plan
TLV – Threshold Limit Value
TMP – Toxics Management Plan
UST - Underground Storage Tank
VAC - Virginia Administrative Code
VOC - Volatile Organic Compound
VPA - Virginia Pollution Abatement
VPDES - Virginia Pollution Discharge Elimination System
VWPP – Virginia Water Protection Permit Program

**ATTACHMENT 2 – ENFORCEMENT RECOMMENDATION AND PLAN - CIVIL
CHARGE/CIVIL PENALTY ADJUSTMENT FORM – ALL MEDIA**

CONFIDENTIAL

**(Until Enforcement Case is Completed)
(Attach to Enforcement Recommendation and Plan)**

Facility/Responsible Party		Per./Reg. No.	Enforcement Action No.		NOV Date
			Data	Amount	
Total Civil Charge/Civil Penalty from Worksheet(s)					
1. Adjustments before Economic Benefit of Noncompliance					
a.	Cooperativeness/Quick Settlement	Y	N		
b.	Promptness of Injunctive Response/Good Faith Effort to Comply	Y	N		
c.	(Air Programs only) – Statutory Judicial Considerations	Y	N		
d.	(Water and Waste Programs only) – Size/Type/Sophistication of the Owner/Operator	Y	N		
	Subtotal (Consult with DE staff if over 30% of gravity-based amount)	Y	N		
2. Adjustments to Worksheet Total					
a.	Problems of Proof	Y	N		
b.	Impacts or Threat of Impacts (or Lack Thereof) to Human Health or the Environment	Y	N		
c.	Precedential Value of the Case	Y	N		
d.	Probability of Meaningful Recovery of a Civil Charge/Civil Penalty	Y	N		
e.	Litigation Potential	Y	N		
	Subtotal (Consult with DE staff)	Y	N		
3. Total Adjustments					
4. Increase for continuing or uncorrected violations, economic benefit from delay		Y	N		
5. Adjusted Total Civil Charge/Civil Penalty					

Justification:

Prepared by:

Approved by:
